United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

244

BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,785

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition To Review an Order of the National Labor Relations Board

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INDEX

TABLE OF CASES

MISCELLANEOUS

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* Authorities chiefly relied upon.

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BRIEF FOR PETITIONER

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Labor Board's Supplemental Decision, declining to draw adverse inferences from Gyrodyne Company's refusal to produce its relevant and subpoenaed records concerning replacement of terminated Union members, complies with applicable law and this Court's previous ruling in this case.

This case was previously before this Court in No. 22,186, wherein its opinion issued on November 5, 1969 (136 U.S. App. D.C. 104, 419 F. 2d 686).

REFERENCES TO PARTIES AND RULINGS

Following this Court's remand in No. 22,186, the National Labor Relations Board's Supplemental Decision issued on October 8, 1970, and is reported at 185 NLRB No. 133. It is reproduced as an appendix (pp. 1A-7A, *infra*).

STATEMENT OF THE CASE

This case arose from the Gyrodyne Company's termination of 30 UAW members at the height of the Union's organizing campaign in 1964. A complaint issued upon the Union's charges alleging violations of Sections 8(a)(3) and (1) of the National Labor Relations Act. The Labor Board, however, following a hearing before a Trial Examiner, dismissed the complaint against Gyrodyne, and the UAW sought this Court's review in No. 22,186. Before this Court the Union contended that it had been prejudiced by the Board's failure to draw adverse inferences against Gyrodyne in consequence of the Company's refusal notwithstanding a subpoena to come forward with material documents. It was urged that by the Board's failure to attach an adverse inference to the Company's suppression of highly relevant evidence, the Union had been deprived of its "day in court" before the Board. This Court agreed with our contention and remanded with directions to the Board to "(1) explain its failure to draw the requested inferences, (2) draw the inferences and explain the consequences, or (3) require production of the records." 136 U.S. App. D.C. at 105, 419 F. 2d at 687. In its Supplemental Decision the Board continues to refuse to draw the applicable inference but fails to give any cogent or credible justification for its refusal. Accordingly, the UAW again invokes this Court's review jurisdiction under Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f).

1. *The Claim of Discriminatory Terminations.* As our earlier brief to this Court detailed,[1] this case involves the

[1] The record references of the earlier brief will not be repeated here.

termination of an extraordinarily high proportion of production and maintenance employees who were UAW adherents at the height of the Union's organizing campaign and only days after Gyrodyne's public pronouncements of glowing prospects and job security for the production and maintenance employees. The Union campaign, which in early 1964 consisted primarily of leafletting and private meetings, intensified with the commencement of open meetings in June of 1964. On June 10, a leaflet distributed at the plant announced that the Union had secured more than the number of authorization cards needed to petition for a Labor Board election (30% of a unit of 273). On the following day with only one or two hours notice, Gyrodyne President Papadakos assembled all of his employees and delivered a long address extolling the Company's current development, predicting a great future, and urging the employees not to place a "wall" between themselves and management. On the very next day, all production and maintenance employees (the subjects of the organizing campaign) were singled out for yet another speech by Papadakos. He specifically stated that the Company had $40 million worth of business to perform, thus ensuring work for the production and maintenance employees for 18 months.

On June 17, the UAW held an open meeting, and the following day announced another meeting a few days hence. On June 19, only one week after Papadakos' glowing promises of work security for production and maintenance employees, Gyrodyne commenced terminations of union members in the production departments. Without prior warning the Company discharged or laid off 11 employees, no less than 10 of whom were members of the UAW. Although the failure to give prior notice of the layoffs to the affected employees conflicted with Gyrodyne's rule that "[w]henever possible, we will endeavor to give a minimum of three days advance notice of any pending lay-off action,"

the Company never offered an explanation for its failure to comply with the rule.

On June 24 a third open union meeting was held. Five days later, again without warning and contrary to the three-day notice rule, 34 more production employees were laid off. Thus within less than three weeks after its assurances of job security in the production and maintenance departments, the Company separated 45 of the 273 employees in these departments. Thirteen of the 34 layoffs on June 29 were probationary employees, having worked at Gyrodyne for less than three and one-half months. Of the 21 laid off regular employees, 16 were UAW members. Yet another union card holder was laid off two days later, on July 1, 1964. The mass layoff of production employees, most of whom were UAW members, in June of 1964 had no precedent in recent Company history. With the precipitous termination of 30 of its members, the UAW was forced to abandon its organizational campaign and to seek redress before the Labor Board.

2. *Gyrodyne's Defense.* Testifying for respondent in the Board hearing, President Papadakos generally denied having had any discriminatory motivation in the termination of 30 UAW members. He specifically denied testimony by his wife and father-in-law that he had admitted firing these employees because of their union activity. In addition to Papadakos' protestations of innocence, Gyrodyne made an attempt albeit a limited one to justify the individual terminations.[2]

However, the thrust of the Company's defense was that the challenged employee terminations were part of a Company program of cost reduction. Gyrodyne introduced into evidence letters from President Johnson and Secretary of Defense McNamara received in December 1963 urging

[2] For example, Gyrodyne claimed that three UAW members were discharged for cause.

the Company as a defense contractor to reduce costs. These letters were sent in accordance with President Johnson's directive, upon taking office the preceding month, to the "heads of all government agencies to accelerate immediately their efforts to operate their programs at the lowest possible cost." According to Gyrodyne's testimony, upon receiving these letters President Papadakos conferred with his department heads and instructed them to consider whether labor costs could be curtailed. Further, according to the testimony of John Hollwedel, one of Papadakos' principal subordinates, the Company "projections" in February or March 1964 indicated that there would be insufficient work for the number of mechanical inspectors employed. About the same time, Hollwedel also concluded during discussions with Anthony Caliendo, another Gyrodyne official, that too many avionic inspectors were being employed. Supervisor Dennis came to the same view regarding blade department employees about the first of May. It was this sequence of events, these officials testified, which led to the June 1964 layoffs.[3] Gyrodyne's witnesses, including President Papadakos, stated further that the laid-off employees were not replaced.

3. *The Withheld Subpoenaed Documents.* Prior to the hearing, the General Counsel subpoenaed from Gyrodyne the names of all persons hired or rehired in the Company's production departments during 1964. The subpoenaed material had critical bearing on Gyrodyne's cost reduction defense and the credibility of the Company's president. If the 30 UAW members were soon replaced by hired or rehired employees, Gyrodyne's cost reduction justification was a sham, and Papadakos' claims of innocent motivation for the terminations were false. Although the Company's petition to revoke the subpoena was denied, and the Trial Examiner expressly warned that he would attach

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[3] While the 273 production and maintenance employees whom the UAW sought to organize constituted only about one-third of Gyrodyne's employees, Gyrodyne offered no evidence of cost analysis or reduction of cost in non-production and maintenance departments.

adverse inferences from a refusal to produce, Gyrodyne withheld these vital documents. Ultimately, however, the Trial Examiner and thereafter the Board failed to draw any adverse inference whatever from the Company's suppression of the rehiring data. Far from inferring the damaging character of the suppressed data, the Board actually credited the Company's self-serving and conclusionary assertion that replacements had not been hired and accepted Gyrodyne's "cost reduction" explanation of the June 1964 layoffs.

4. *This Court's Previous Decision.* Before this Court in No. 22,186 our central contention was that Gyrodyne's concealment of the data on replacement of the terminated Union members in the months immediately following their layoffs required the Board to draw an inference adverse to the Company: the inference that Gyrodyne did promptly undertake replacement of terminated union members, in obvious refutation of its cost reduction defense. The Labor Board having simply ignored Gyrodyne's refusal to produce, we urged this Court to remand the case for further Board proceedings. The Board's response before this Court was that drawing of inferences is "permissive and not mandatory" (brief, p. 60). Alternatively, the Board contended (brief, p. 27) that if there was procedural error it was not prejudicial to the Union. This Court, however, found the subpoenaed records "clearly relevant". And, noting specifically that the subpoenaed "list of persons hired or rehired could have shown whether employees that Gyrodyne claimed had not been replaced had been replaced", this Court found itself unable to agree that the Board's "failure to draw the requested inferences was not prejudicial." The Court therefore remanded, requiring the Board to: "(1) explain its failure to draw the requested inferences, (2) draw the inferences and explain the consequences, or (3) require production of the records."

5. *The Proceedings on Remand.* Following this Court's decision the Board issued a notice to the parties to show cause why it "should not draw an adverse inference from

[Gyrodyne's] failure to produce the subpoenaed records" and in that event why it "should not reverse its original decision dismissing the complaint." The Board thus rejected at the outset the option left open by this Court to order the production of the previously withheld documents. Moreover, not even Gyrodyne—which had an obvious interest in that option if in fact the records sustained its claim rather than refuted it—urged that course. Gyrodyne having been given by this Court's "order to produce" alternative a last chance to avoid the inference rule chose what it deemed the lesser evil, thus underlining again the damaging character of the documents it feared to produce.

In its brief to the Board, the Union relied principally on Gyrodyne's suppression of the data relating to the replacement of the laid-off employees. The other materials not produced by Gyrodyne—such as the payroll and personnel records of certain employees—received little or no emphasis. Instead we argued that the "inference of rehires for the severed union members leaves the Company's cost reduction defense of the severances utterly devastated" (brief, pp. 26-27), and that the case of discriminatory motivation in Gyrodyne's severance of so many union supporters at the height of the organizing drive therefore becomes overwhelming.

6. *The Board's Supplemental Decision.* The Board in its Supplemental Decision, however, again refuses to draw any adverse inferences against Gyrodyne. Although our argument to the Board was premised almost entirely on the Company's refusal to produce the rehiring records, they are hardly mentioned. Instead, the Board devotes the bulk of its decision to explaining why it failed to draw inferences from Gyrodyne's withholding of employee payroll and personnel records and certain organizational manuals and charts. After an elaborate discussion of what the Company had and had not produced with respect to these documents, the Board is perfunctory regarding the critical documents concerning replacement of the severed

Union adherents. In refusing to draw adverse inferences on that score, the Board merely points to the existence of self-serving oral testimony by Company witnesses that none of the terminated employees were replaced. In addition, the Board notes testimony that further terminations had taken place which were not alleged to be discriminatory, and that the total number of employees dropped between the challenged layoffs in June 1964 and the hearing about one year later.[4] Although, as the Board concedes, the failure to produce relevant materials "usually" gives rise to an adverse inference or has "persuasive value in discounting the credibility of the party failing to produce," the Board holds that the above circumstances justified a departure from the normal rule (Appendix, pp. 2A-3A, *infra*).

We demonstrate in the Argument that the Board's continued refusal to draw an inference from the Company's suppression of the evidence concerning replacement of the terminated Union members violates applicable law and does not comport with this Court's remand.

ARGUMENT

I. THE BOARD VIOLATES ESTABLISHED LEGAL PRINCIPLES IN DECLINING TO DRAW INFERENCES FROM GYRODYNE'S REFUSAL TO PRODUCE HIGHLY RELEVANT SUBPOENAED RECORDS.

Our previous brief to this Court set forth the rationale and function of the adverse inference principle and the numerous authorities which have applied it. While this Court's decision gave full recognition and application to the rule, the Board's Supplemental Decision plainly rejects it. Accordingly, before addressing the Board's specific rationalizations for refusing to draw an adverse inference in the present case, we briefly recapitulate the governing principle and the authorities.

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[4] The 7% drop in employees (see Vol. II, p. 1793 of Appendix in No. 22,186) one year after the layoffs is hardly meaningful in view of the tremendous turnover of Company employees. For example, 14 new employees were hired in the machine and blade shops during the two months before substantial layoffs in these departments in June 1964 (see our earlier brief, p. 13).

With respect to the basic inference rule Wigmore has written:

> "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party." II Wigmore, Evidence § 285, p. 162 (3rd ed., 1940).

With specific respect to documents, Wigmore added:

> "The applicability of the general principle to an opponent's non-production or suppression of *documents or chattels* has always been assumed. From the beginning of the recognition of the principle in England, some sort of inference has been acknowledged to be legitimate. In this country, similarly, the tradition has been continued and steadily enforced, in numerous instances, where the opponent has *destroyed, suppressed, or refused or failed to produce* a document or chattel whose contents or quality came into issue or became relevant under the issues." (Footnotes omitted, emphasis original) *Id.* § 291, pp. 180-81.

The drawing of an adverse inference as the logical conclusion from the fact of nonproduction is based on an axiom of human experience that Lord Mansfield explicated as early as 1774.[5] As this Court stated in *Tendler* v. *Jaffe*, 92 U.S. App. D.C. 2, 7, 203 F. 2d 14, 19 (1953):

> "There is a further rule that the omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause. Kirby v. Talmadge, 1896, 160 U.S. 379, 383, 16 S. Ct. 349, 40 L. Ed. 463; Fidelity & Deposit Co. of Maryland v. Helvering, 1940, 72 App. D.C. 120, 126, 112 F. 2d 205, 211. Such presumption aids the case of an opposite party having the burden of proof. See, also, Interstate Circuit v. United States, 306 U.S. 208, 226, 59 S. Ct. 467, 83 L. Ed. 610, and Foust v. Munson S.S. Lines, 299 U.S. 77, 86, 57 S. Ct. 90, 81 L. Ed. 49."

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[5] *Blatch* v. *Archer*, 1 Cowp. 63, 65.

This rule has been applied in numerous cases, many involving the Labor Board. See *Interstate Circuit* v. *United States,* 306 U.S. 208, 226 (1939); *Washington Gas Light Co.* v. *Biancaniello,* 87 U.S. App. D.C. 164, 167, 183 F. 2d 982, 985 (1950); *NLRB* v. *Wallick,* 198 F. 2d 477, 483 (C.A. 3, 1952); *NLRB* v. *Remington Rand, Inc.,* 94 F. 2d 862, 872 (C.A. 2, 1938); *Cusano* v. *NLRB,* 190 F. 2d 898, 902 (C.A. 3, 1951); *NLRB* v. *A.P.W. Products Co.,* 316 F. 2d 899, 903-04 (C.A. 2, 1963); *P. R. Mallory Co.* v. *NLRB,* 400 F. 2d 956, 959 (C.A. 7, 1968); *Forster Manufacturing Co., Inc.,* 175 NLRB No. 29, 70 LRRM 1520, 1523 (1969); *Monahan Ford Corporation of Flushing,* 173 NLRB No. 37 (Slip op. p. 9), 69 LRRM 1279 (1968); *Welcome-American Fertilizer Co.,* 169 NLRB No. 104, 67 LRRM 1484 (1968); *Crow Gravel Co.,* 168 NLRB 1040, 1047 (1967); *Mid States Sportswear, Inc.,* 168 NLRB 559 (1967); *L. B. Foster Co.,* 168 NLRB 83, 86; *San Diego Paper Box Co.,* 174 NLRB No. 169 (Slip op. p. 8), 70 LRRM 1418 (1969). Indeed, Board decisions have been set aside on review where the adverse inference was not drawn. *NLRB* v. *Ohio Calcium Co.,* 133 F. 2d 721, 727 (C.A. 6, 1943); *NLRB* v. *Ford Radio & Mica Corporation,* 258 F. 2d 457, 463 (C.A. 2, 1958); *NLRB* v. *Tennessee Consolidated Coal Co.,* 307 F. 2d 374, 378 (C.A. 6, 1962); cf. *NLRB* v. *Selwyn Shoe Manu. Corp.,* 428 F. 2d 217, 225-26 (C.A. 8, 1970).

We demonstrate hereafter, *infra,* pp. 13-17, that each of the Board's several rationalizations for its failure to apply the adverse inference rule have no merit or cogency. But the pervasive error underlying the Board's entire decision on remand is its failure to understand and accept the adverse inference rule at its very core. The Board's statement (p. 3A, *infra*) that suppression of relevant evidence by a party is merely "a fact to be considered" as one among "all of the circumstances of the case," demonstrates utter lack of appreciation of the theory of the inference. That principle has nothing to do with, and its applicability does not at all depend on, the particular facts of a given case. Rather it represents a general principle of human experi-

ence that a party will produce the strongest available evidence in any litigation of his rights, and his suppression thereof evidences the unfavorable character of the matter he fears to produce. The principle can, of course, be overcome by a cogent reason such as a party's inability to produce his best evidence at the trial. But if nothing of that kind is shown—and there is nothing of that kind suggested here—then the drawing of the natural inference that the best evidence withheld was adverse to the party who suppressed it is in no way dependent upon the particular facts in the case, or upon a balance of evidence on either side. It is a mandatory evidentiary presumption. We find it most revealing that for the contrary principle espoused by the Board it cites not a single authority.

Thus, it seems clear that the Board has rejected the very heart of the adverse inference rule in suggesting that Gyrodyne's suppression of the relevant documents which could show hiring of replacements for terminated union members is merely a fact among others which it can note without drawing any adverse inference. But what makes the compulsory character of the inference doubly clear and indisputable in the present setting, is the fact that here the Company did not merely fail to come forward on its own with the best evidence on the subject of replacements. Here it actually suppressed and secreted that evidence in the face of a subpoena calling for its production. The General Counsel duly subpoenaed data which would have shown whether there was hiring of replacements for the terminated Union members during the six months immediately following their separation. The Company's petition to revoke the subpoena was denied; it was warned that the Examiner would draw an adverse inference from its failure to honor a subpoena; but it refused to provide the data.

Surely when a party withholds relevant evidence formally sought by the opposing parties and thus frustrates their rights to compulsory production of evidence, the Board has no option simply to overlook the

matter by declining either to order the production of the suppressed evidence or to draw an adverse inference from its suppression. Under the statute the General Counsel and the Union had a clear legal right to disclosure of the relevant evidence sought by subpoena concerning the hiring of replacements for the terminated Union members. See Section 11(1) of the Act, 29 U.S.C. § 161(1); § 102.31 NLRB Rules and Regulations, Series 8 as amended in 1959, 29 CFR 102.31. Here the evidence has already been found relevant by this Court and the Board, and indeed it was crucially needed to test the Company's central defense that the Union members had been terminated to reduce the payroll as part of a "cost reduction" effort. Denial of compulsory production of evidence so critical to the case deprived the General Counsel and the Charging Party of their fair "day in court". Moreover, it gave an advantage in the litigation to the party who wrongfully frustrated compulsory process; under similar circumstances the Supreme Court long ago invoked the rule that no party shall benefit from his wrongdoing. *Reynolds* v. *United States*, 98 U.S. 145 (1878).

The Board has no discretion under these circumstances to treat the Company's suppression of the subpoenaed data as simply some harmless irregularity to which no consequences should be applied. Yet that is precisely what the Board does when it not only refuses to draw any adverse inferences from the suppression of the rehiring evidence but continues to credit the Company's self-serving assertions that replacements were not hired for the terminated UAW members and that they were separated as part of a genuine cost reduction effort. Having flagrantly abused the Board's processes by withholding relevant subpoenaed materials, Gyrodyne must suffer the normal consequences of the adverse inference principle.[6]

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[6] Indeed while we urge only the more modest remedy of the attachment of adverse inferences, Gyrodyne's refusal to produce could actually have supported the striking of its cost reduction defense. Cf. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 350-51 (1909); Rule 37(b)(2)(B) of the Federal Rules of Civil Procedure.

II. THE BOARD'S DIVERSE RATIONALIZATIONS ARE INADEQUATE TO JUSTIFY ITS FAILURE TO INFER THAT THE TERMINATED UAW MEMBERS WERE REPLACED.

In its previous opinion this Court directed that if the Board still declined to draw adverse inferences against Gyrodyne because of its suppression of subpoenaed documents it should explain its failure to do so. The Board attempts in its Supplemental Decision to offer a variety of explanations for its failure to draw inferences adverse to Gyrodyne. We show below that none of them justify the result espoused by the Board.

1. *Reliance on Existence of Credited Oral Testimony.* The Board (p. 5A, *infra*) explains its failure to infer replacement of UAW adherents from the nonproduction of the rehiring records by stating that the Examiner credited testimony of Company officials (including President Papadakos) that they were not replaced. But the Board's reliance on the oral testimony of Gyrodyne's witnesses to justify nonproduction of documentary evidence demonstrates most forcibly that the Board does not understand the principle at issue. The logic of the situation and the rule is that "production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." *Interstate Circuit* v. *United States, supra,* 306 U.S. at 226. Yet the Board holds that the production of weak evidence (the oral testimony) justifies nonproduction of strong (the documents). *Thus the Board's rationalization based on the weaker credited testimony is simply a rejection of the adverse inference rule.*

Moreover, the Board's emphasis on the "credited" testimony of President Papadakos and other Gyrodyne officials actually highlights the additional importance of the suppressed rehiring data for the purpose of testing credibility. When the Board suggests that the rehiring list was unnecessary because Gyrodyne witnesses testified that there were no replacements for the terminated Union supporters, it overlooks the vital right of cross-examination

and impeachment of that very testimony and of the witnesses who gave it.[7] As this Court noted in its previous opinion, "*the list of persons hired or rehired could have shown whether employees that Gyrodyne claimed had not been replaced had been replaced.*" 419 F. 2d at 687, n. 1. The Board has made this ground stated by the Court for production of the rehiring data and drawing of the adverse inference the *very* ground for nonproduction of the data and refusal of the inference! The self-serving testimony by Gyrodyne that it did not replace the terminated UAW members was thus not a substitute for production of the hiring data, but an additional important ground for compulsory disclosure.

2. *Emphasis on Tangential Records.* Our brief to the Board relied almost entirely on Gyrodyne's suppression of data relating to the replacement of the laid-off employees (see *supra,* p. 7). Yet the major portion of the Board's Supplemental Decision is devoted to quite different records whose nonproduction was barely mentioned in our submission to the Board. Thus the Board undertakes elaborate discussion concerning the payroll and personnel records of certain employees, which bear no relation whatsoever to the central question of the replacement of the laid-off UAW members.

The Board's emphasis (p. 4A, *infra*) on the "blue cards" which the Company magnanimously offered is equally misplaced. Instead of proffering the full personnel file of each discriminatee as requested—which, for example, would have shown any written warnings administered to the UAW members allegedly discharged for "cause"—Gyrodyne offered only summary blue cards with attendance, punctu-

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[7] Papadakos' repeated denials of discriminatory motivation being central to Gyrodyne's defense, impeachment of the witness Papadakos is no small matter. Further, it bears recollection (as we showed in our earlier brief at pp. 16-18) that Papadakos' veracity was gravely undermined by the testimony of his wife, his father-in-law, and a Navy commander, and was otherwise lacking in believability.

ality, wage rates and like information. That the Company produced part of its records but not the remainder does not exonerate its default. Rather, it suggests that Gyrodyne was capable of making disclosures when it wanted to but viewed the withheld documents as damaging to its cause. The Board's lawyers emphasized the Company's proffer of the blue cards to this Court in the previous case (brief, pp. 58-59, and oral argument) without any apparent impact on this Court's decision and it has no more significance now.[8]

The Board also discusses (p. 5A, *infra*) the Company's organizational charts subpoenaed to show lines of authority and supervisory status. Here the testimony revealed that there were, at the time of the hearing, no such charts in existence for the time of the layoffs one year earlier. But this explanation, which absolves the Board from drawing an adverse inference from the Company's nonproduction of the charts, cannot apply to the withheld hiring records and instead highlights the absence both of any Company excuse on that score and of any basis for the Board's failure to draw adverse inferences therefrom.

3. *Suggestion of Recourse to Subpoena Enforcement.* The Board also reiterates a suggestion it presented unsuccessfully to this Court in the earlier case (Board brief, p. 59), that an inference need not be drawn from Gyrodyne's nonproduction because the General Counsel did not avail himself of the opportunity to secure judicial enforcement of the subpoena. But the Board's reference to the judicial enforcement mechanism wholly ignores the Exam-

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[8] Another item "produced" by the Company upon which the Board relies (p. 4A, *infra*) is a self-serving compilation of reasons for the terminations (General Counsel's Exhibit 11, Appendix in No. 22,186, Vol. IV, pp. 101-115). This contrasts with the underlying records subpoenaed by the General Counsel which might have reflected the actual reasons for termination. In its discussion the Board again rejects the normal inference rule by excusing Gyrodyne's nonproduction of documents because of the Company's proffer of "weaker" oral testimony that the compilation accurately reflected the underlying documents.

iner's assurance that "I will draw my own inferences from the refusal" to produce (Vol. I, p. 396, Appendix in No. 22,186).[9] The General Counsel and the Union were entitled to rely on the Trial Examiner's assurance and particularly because the judicial enforcement procedure is extraordinarily time consuming. If the Company before the Board by declining to honor its subpoena can force the Board to immediate judicial enforcement on pain of waiving any other or future recourse from failure to do so, then by its own conduct it can win between one and three years of delay in the proceedings during the initial action and appeal.

In any event, we repeat our response to this Court (reply brief, pp. 5-6) that "the Board's discussion of procedures for enforcing subpoenas entirely misses the point of our argument". We stated that the inference from suppression "is particularly compelling where the party who has the records available not only fails to bring them forward voluntarily, but withholds them in defiance of a valid subpoena." But the inference is not dependent on the issuance of compulsory process. Nonproduction of best evidence in itself gives rise to an adverse inference. The availability of compulsory process and judicial enforcement cannot possibly detract from the fundamental proposition that an adverse inference arises from the Company's failure to produce material documents even in the absence of formal subpoena demand for disclosure. The paradoxical effect of the Board's suggestion would be that the issuance of a subpoena gives a party an *inferior* right to have the opposing party disclose on pain of adverse inferences from nonproduction!

4. *The Board's "Same Result" Conjecture.* In a final gambit to avoid another reversal by this Court, the Board suggests (*infra*, p. 6A) that even assuming "arguendo"

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[9] The Examiner's later statement that he would "make nothing of the fact that the company refused to respond to the subpoena" came after the General Counsel and Union had rested their case in chief.

that adverse inferences were to be drawn against Gyrodyne from its failure to produce, it does not believe that such inferences "would produce a sufficient evidentiary basis for reversing our Decision herein, particularly in view of the Trial Examiner's credibility findings . . ." Of course, this is mere afterthought constituting conjecture not adjudication, for the Board cannot objectively determine the evidentiary consequence of an adverse inference it is refusing to draw.

In any event, the Board's assertion is quite groundless. The adverse inference that in the months following the layoffs Gyrodyne hired replacements for the discharged union members utterly destroys the Company's central defense that they were terminated to effect payroll savings as part of a cost reduction effort. Moreover, as we have shown, and as this Court's earlier opinion intimated, the drawing of the adverse inference also destroys the very "credibility" findings the Board cites for its conjecture that the adverse inference would not tip the scales on the merits of the case. Plainly put, the Board's suggestion that even after the drawing of the inference that it replaced the Union members the Company still could remain exonerated from its violation, "particularly in view of . . . the credibility findings", is not agency adjudication, it is nonsense. No more than its other makeweight rationalizations can the Board be affirmed on this ground in its continuing refusal to draw adverse inferences from Gyrodyne's suppression of relevant subpoenaed data concerning its hiring of replacements for the terminated UAW members.

CONCLUSION

On its previous remand this Court gave the Board the options if it declined to draw adverse inferences either 1) to order production of the suppressed evidence or 2) make satisfactory explanation of its failure to infer the unfavorable character thereof. Neither the Board nor the parties showed any interest in the first option (see p. 7, *supra*).

And as concerns the Board's purported explanations of its failure to draw any adverse inferences we have demonstrated their utter lack of cogency. The truth is that the Board has paid lip service to the adverse inference rule underlying this Court's earlier remand but actually it rejects it. The Board, on remand, did little more than say it had been right all along. It neither asked for the records nor drew any inferences from the refusal of their production. Its weak "explanations" are an exercise in self-justification of an earlier result this Court required to be reconsidered. Judicial review will hardly continue meaningful if the Board can utilize such weak rationalizations to reaffirm its earlier result.

Nothing new or substantial having been presented since the previous arguments to this Court, it seems clear that the Board's decision should be reversed with an instruction that it draw the necessary inference from the Company's suppression of the subpoenaed documents: that in the months immediately following their termination it hired replacements for the laid off UAW members. Having made that inference, it is clear that the Board can no longer credit Gyrodyne's "cost reduction" explanation of the layoffs and that the ample showing of 8(a)(3) violations requires the Board's issuance of a remedial order.

Respectfully submitted,

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APPENDIX

185 NLRB No. 133

D-4277
Plainview, L. I., N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 29-CA-57

GYRODYNE COMPANY OF AMERICA, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Supplemental Decision

On March 12, 1968, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which it adopted the findings, conclusions, and recommendations of Trial Examiner Arthur E. Reyman as contained in his Trial Examiner's Decision of January 21, 1966. The Board therein accepted the Trial Examiner's credibility resolutions, found that certain individuals with knowledge of employee union activity were not supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended, and concluded that Respondent had not engaged in conduct in violation of Section 8(a)(1) and (3) of the Act as alleged. Subsequently, the Charging Party filed with the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Board's Order dismissing the complaint.

Thereafter, on November 5, 1969, the Court handed down its opinion[2] in which it stated that certain of Respondent's records, subpoenaed by the General Counsel but not produced by Respondent, appear clearly relevant to the issues

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[1] 170 NLRB No. 25.

[2] 419 F.2d 686.

in the case. The Court noted that while the Trial Examiner had originally stated that he would draw adverse inferences from Respondent's failure to produce, he later stated that "I make nothing of the fact that the Company refused to respond to the subpoena." The Court was of the opinion that if adverse inferences from Respondent's failure to produce were not to be drawn, the failure to draw such adverse inferences should be explained. Accordingly, the Court remanded this case to the Board to either (1) explain the failure to draw the requested inferences, (2) draw the inferences and explain the consequences, or (3) require production of the records.

On February 2, 1970, the Board issued a Notice to Show Cause why it should not draw an adverse inference from the Respondent's failure to produce the subpoenaed records and, if it should draw such adverse inference, why it should not reverse its original decision dismissing the complaint. Thereafter, the General Counsel, the Respondent, and the Charging Party filed memoranda in response to the Notice to Show Cause, and the Charging Party filed a brief in reply to the Respondent's response.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board, having reexamined the Decision and Order, the Court's Decision, as well as the entire record including the parties' responses to the Notice to Show Cause, adheres to its original Decision and Order herein. In doing so, we conclude that under the circumstances noted hereafter it was unnecessary to draw adverse inferences and that the failure to draw the requested inferences was not prejudicial.

We agree with the Court that the subpoenaed material appears clearly relevant. Usually, the failure to produce such material gives rise to an inference that it would be

unfavorable or adverse to the party failing to produce it, and also has persuasive value in discounting the credibility of the party failing to produce. However, the failure to produce is a fact to be considered in view of all the circumstances of the case. Had Respondent's oral testimony been unreliable or untrustworthy, the subpoenaed materials would have assumed more importance.[3]

The issue of the subpoenaed materials was, to say the least, vigorously litigated. When the issue of the relevant subpoenaed records first arose, the General Counsel questioned the Respondent's Assistant Personal Manager in general terms about their existence and whereabouts. The record reveals that some of the subpoenaed records were available and in the hearing room. After the Trial Examiner suggested that the General Counsel call for the production of the records, if relevant, the matter was temporarily dropped. Later, both the General Counsel and the Trial Examiner asked Respondent's witness to produce the payroll record for the "blade department" pursuant to item 1 of the subpoena. However, item 1 of the subpoena does not mention the "blade department," but merely requests payroll and personnel records for 75 listed employees and supervisors. When the Respondent's attorney attempted to call this discrepancy to the attention of the Trial Examiner,[4] the Trial Examiner noted that production of the records had been refused, that he would draw his own inferences therefrom. Later, when the Charging Party called for the personnel records of a specific individual, Respondent produced the file, stated that it would not allow a "free-for-all inspection" by the opposition, but allowed the Trial Examiner to inspect it. After examining

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[3] *Mid States Sportswear, Inc.*, 168 NLRB No. 74; *Crow Gravel Co.*, 168 NLRB No. 141.

[4] During the time the Trial Examiner was calling for production of the records, he changed the request to include all the material subpoenaed in item 1, but the Respondent's attorney still believed that the request was only for the "blade department."

the file, the Trial Examiner stated that he thought "that the anticipation of finding things in here which you hope to find is unwarranted . . ." The Trial Examiner suggested that the Charging Party and General Counsel question from a summary blue card form in the personnel files of each discriminatee, stating that he was reluctant to "just turn the file over for a general fishing expedition for whatever may appear in here," and further advising that the proper forum for enforcement of the subpoena was in the District Court. Thereafter, the Charging Party asked for the personnel folder of each alleged discriminatee, and the Respondent offered the "blue card" but refused to furnish any other portions of the personnel records. Both the General Counsel and the Charging Party rejected the offer of the blue cards.

As the Court noted, payroll and personnel records were relevant in seeking to show reasons for the discharges. However, the General Counsel's exhibit number 11 compiled from the records of the Respondent, substantially complied with the General Counsel's request for the Company's reasons for discharge. That exhibit on its face showed termination and reasons therefor for all terminations taking place between January 1, 1964 through October 31, 1964. Moreover, it is clear from credited testimony that the reasons for terminations, as stated on that exhibit, were compiled from company and personnel records. In addition, Respondent offered to supply the summary blue card form from all personnel records from which the General Counsel or the Charging Party could have begun interrogation of Respondent's witnesses had they desired to take advantage of the offer. In this regard, the blue card summary for each employee could have been compared as to job description, rates of pay, supervisory authority, and other matters, and responsibility for failure to do so cannot now be attributed to Respondent. Finally, no one has suggested exactly what inference can be reasonably drawn from Respondent's failure to supply the complete

personnel folder, particularly in view of the fact that the Employer's reasons for discharge are stated on the General Counsel's exhibit number 11. Nor have the General Counsel or Charging Party indicated what material would be relevant within those files. Consequently, we are unable to infer that the personnel files will establish that the discharges were because of union activity, the inference apparently implied by the Union.

At one point in the hearing, the General Counsel asked Respondent's Assistant Personnel Manager if the Company maintained manuals and charts with regards to lines of authority, but withdrew the question before it was answered. When asked by the Charging Party, the Respondent produced an organizational chart, which was identified as an exhibit of the Charging Party. The exhibit was further identified as a current chart covering the structure of the "fabrication" department, which apparently included many of the departments in which the alleged discriminatees involved herein worked. It was explained that the chart was current and that only a current chart was maintained. The Charging Party did not introduce the chart in evidence nor elicit any meaningful testimony regarding supervisory status from it. Rather, after having an opportunity to examine the chart, the Charging Party refrained from questioning about the chart. Still, the Charging Party requests us to infer that the Company's leadmen were supervisors or agents of the Company within the meaning of the Act, because the Company refused to furnish requested documents. From the record, and under the circumstances, we believe the Company substantially complied with the Charging Party's request to this aspect of the General Counsel's subpoena. There was no refusal to furnish the chart the Charging Party identified as an exhibit, but failed to offer.

Regarding a list of employees rehired, the record shows and the testimony was credited, that none of the laid off or discharged employees were subsequently rehired. There

was also credited testimony that further terminations had taken place subsequent to the alleged discriminatory discharges which were not even alleged as discriminatory. And the record discloses that the total number of employees dropped substantially from the time of the alleged discriminatory layoffs until the time of the hearing.

Although it is true that the Board generally views suspiciously a failure to produce relevant documents and material witnesses, and will draw adverse inferences from such failure in apropriate circumstances, we deem it unwarranted to draw those inferences here where the Employer's witnesses are credited, where the General Counsel and the Charging Party refused some documents produced, and where the Employer did produce many of the documents requested. Indeed, at one point, the General Counsel asked if the Respondent had a list of employees transferred, and on obtaining an affirmative response, the matter was dropped.

Even assuming, *arguendo,* adverse inferences were to be drawn from the Respondent's failure to produce, we nevertheless do not believe that such inferences as could be drawn would produce a sufficient evidentiary base for reversing our Decision herein, particularly in view of the Trial Examiner's credibility findings which were based on evidence subsequently adduced by the Employer.

Moreover, the General Counsel had adequate opportunity to seek enforcement of his subpoena in Court. He did not do so, but proceeded with the presentation of his case, often through secondary evidence even after being advised on numerous occasions that the forum for enforcement was with the Courts. Our determination here does not mean that we condone all the actions of the Respondent or that we will not in other circumstances draw adverse inferences from failure to produce relevant materials subject to a lawful subpoena. We do conclude that under the circumstances of this case, there was no failure to draw ad-

verse inferences which was prejudicial to any party. We adhere to our original Decision and Order.

Dated, Washington, D. C. Oct. 8, 1970.

EDWARD B. MILLER, *Chairman*

JOHN H. FANNING, *Member*

GERALD A. BROWN, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

No. 24,785

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

On Petition for Review of an Order of
The National Labor Relations Board

BRIEF AND SUPPLEMENTAL APPENDIX FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

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* Authorities chiefly relied upon.

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On Petition for Review of an Order of
The National Labor Relations Board

BRIEF AND SUPPLEMENTAL APPENDIX FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably exercised its discretion in refusing to draw adverse inferences from Gyrodyne Company's nonproduction of certain subpoenaed documents.

In accordance with Rule 8(d) of the General Rules of this Court, the Board states that this case was previously before the Court in No.

22,186; the Court's opinion in that case issued on November 5, 1969 (136 U.S. App. D.C. 104, 419 F. 2d 686).

REFERENCE TO RULINGS

This case is before the Court upon the petition of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (hereinafter, the "Union"), pursuant to Sec. 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), to review and set aside a Supplemental Decision of the National Labor Relations Board, issued on October 8, 1970. On November 5, 1969, this Court issued an order, remanding the Board's order in the original proceeding, reported at 170 NLRB No. 25 (D & O-IV-74, TXD-IV-4-57).[1] The Board's Supplemental Decision pursuant to the remand is reported at 185 NLRB No. 133.

COUNTERSTATEMENT OF THE CASE

In its initial decision, the Board found that certain individuals with knowledge of employee union activity were not supervisors within the meaning of Section 2(11) of the Act, as amended, and concluded that

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[1] References designated "D & O-IV" and "TXD-IV" are to the Board's original Decision and Order and the Trial Examiner's Decision, respectively, printed in Volume IV of the Appendix to the parties' briefs in No. 22,186. "G.C. Exh. IV" and "R. Exh. IV" are to the General Counsel's and the Company's exhibits respectively, printed also in Volume IV. "S.A." refers to the Supplemental Appendix printed in the back of this brief. The Supplemental Appendix includes the Board's Supplemental Decision and portions of the transcript referred to in the instant brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Gyrodyne Company of America, Inc. (hereinafter, "the Company") had not engaged in conduct in violation of Section 8(a)(1) and (3) of the Act as alleged. Subsequently, the Union filed with this Court a petition for review of the Board's Order dismissing the complaint.

Thereafter, on November 5, 1969, this Court handed down its opinion in which it stated that certain of the Company's records subpoenaed by the General Counsel, but not produced by the Company, appeared clearly relevant to the issues in the case. The Court noted that while the Trial Examiner had originally stated that he would draw adverse inferences from the Company's failure to produce, he later stated that "I make nothing of the fact that the Company refused to respond to the subpoena." (419 F. 2d at 687) The Court was of the opinion that if adverse inferences from the Company's failure to produce were not to be drawn, the failure to draw such adverse inferences should be explained. Accordingly, the Court remanded the case to the Board either (1) to explain the failure to draw inferences from the nonproduction of the requested documents; (2) to draw the inferences and explain the consequences; or (3) to require production of the records. On remand, pursuant to a notice issued by the Board, the parties filed statements of position with respect to the nature of the inferences, if any, to be drawn and the consequences thereof. Upon receipt of these statements, the Board reexamined the evidence on the record and reaffirmed its original Decision and Order dismissing the complaint. The relevant facts are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Union launched its campaign to organize the Company's 275 production and maintenance employees in January 1963, 18 months before the alleged discriminatory events herein (TXD-IV-8; S.A. 22, 33). During this time it solicited card signers, distributed pamphlets[2] and conducted meetings (TXD-IV-8; S.A. 22). As explained by Union representative Lewis Urban, the prolonged Union campaign was attributable to "apathy as far as the union drive is concerned" (S.A. 23). Indeed, in a pamphlet distributed to the employees in June 1964, the month most of the allegedly unlawful events herein occurred, the Union urged the employees to "[s]hake off your apathy" (R. Exh.-IV 172). Thus, at the Union meeting of March 1964, 15 months after organizational efforts commenced, only 10 or 11 people were present and in June, at two "open" meetings for all employees, only "twenty to thirty" and "eight to ten" employees attended (TXD-IV-8; S.A. 20, 23).

As detailed more fully in the Board's brief to this Court in No. 22,186, the Company, in 1964, initiated a program of cost reduction in response, *inter alia*, to letters from President Johnson and Secretary of Defense McNamara (TXD-IV-14; S.A. 24-26, R. Exhs.-IV-178-179) strongly urging defense contractors[3] to pare costs as part of a Defense

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[2] The Company responded to none of these pamphlets (Tr. 1860). Indeed, as Company President Papadakos testified, the Company viewed unions and union organizing as a "way of life" – "one leaves, the other one comes" (TXD-IV-9; S.A. 28, 31). Union organizing had occurred as early as 1952 and, in an election conducted June, 1962, just 6 months before the beginning of the UAW campaign, the employees had rejected union representation by a vote of 116 to 33 (TXD-IV-9; S.A. 1) (Board Case No. 2-RC-12006, *International Union of Electrical, Radio & Machine Workers.*).

[3] The Company's only customer was the U.S. Navy.

Department $4 billion cost reduction program and advising that successful cost reduction would be considered in awarding future contracts. Upon receipt of the President's letter, Papadakos instructed his department heads to embark on a program of cost reduction (TXD-IV-14; S.A. 26). As a consequence of the cost reduction drive and other factors, the Company was required to lay off, from March to July 1964, 61 production and maintenance employees, of whom 21 were alleged to have been discriminatorily laid off (G.C. Exh.-IV-100-115, 76-78). In addition, during the same period, certain employees were discharged for cause unrelated to Union activities. Of 70 employees terminated between March 2 and July 2, 1964, 30 were alleged discriminatees. No employees were hired in the production and maintenance departments to replace any of these employees even though 45 additional employees left the Company's employ by layoff or other reason from July 1964 to the beginning of the hearing on May 17, 1965. (TXD-IV-45; S.A. 9, 27).

On June 11 and 12, 1964, Papadakos, pursuant to an "annual custom" (TXD-IV-41; S.A. 31), delivered a speech to employee assemblies in which he outlined the history and development of the Company, its present sitaution, and its future prospects – which included enough work for 18 months. (TXD-IV-41, S.A. 21, 18, 28). Papadakos cautioned, however, that the Company would have to "consolidate and tighten our belts and we will probably start having layoffs." (S.A. 2). During Papadakos' June 12 address, reference was made to the term "wall" – Papadakos explaining that in an expanding company there are no walls or obstacles which bar an employee's promotion until a vacancy is created by death or resignation. (TXD-IV-42; S.A. 19, 32).

As delineated in greater detail in the Board's earlier brief in No. 22,186, the Company's supervisory personnel, with two exceptions,[4] did not possess knowledge of the Union activities of the alleged discriminatees. Thus, conversations relied upon by the General Counsel and Union to establish Company knowledge were between employees and leadmen not proven to be representatives of management. The Board may not in these circumstances attribute the leadmen's knowledge of union activities to the Company as a basis for finding that unfair labor practices had been committed. Moreover, the General Counsel adduced no credible evidence to support an inference that an anti-union animus motivated the terminations. Thus, in seeking to establish Company animosity toward the Union (and knowledge of Union activities), the Union relies, in part, on the testimony of Papadakos' wife and father-in-law, attributing an anti-union remark to Papadakos. Papadakos denied making this remark and the Trial Examiner credited his denial (TXD-IV-56; S.A. 29). Accordingly, the Board, in agreement with the Trial Examiner, concluded that a preponderance of the evidence did not support findings that the employees named in the complaint were terminated to discourage Union activities.

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[4] On the sole basis of evidence of knowledge on the part of two supervisors, the Board was unable, in the absence of evidence of Union animosity, to impute an unlawful motivation to the Company in terminating the alleged discriminatees involved herein. Thus, Supervisor Ackles, in June 1964, asked one employee "about this Union" (TXD-IV-25; S.A. 20). In view of the isolated nature of this occurrence, no inference of unlawful motivation could be drawn. Supervisor Alfieri asked one employee in February, 1964 if he had signed a Union card, and another in March 1964 if he had attended a Union meeting (TXD-IV-18, 28; S.A. 2-3, 17-18). The information sought, however, was general in nature, Alfieri was a low-ranking supervisor, the questions were asked in the plant and in an informal manner and the replies in general were truthful. Again, no basis existed for ascribing a discriminatory purpose to the Company.

B. Subpoena duces tecum

On April 22, 1965, the General Counsel served the Company with a subpoena *duces tecum*, directing the Company's personnel manager to appear at the unfair labor practice hearing and produce specified records (G.C. Exh.-IV-87-89). A rider attached to the subpoena directed the production of the following records:

1. Payroll and personnel records for the period January 1 through July 1, 1964, showing dates of employment, rates of pay, deductions from pay, bonuses, shifts worked, hours worked, classifications of employees, transfers, job performance evaluation and reasons for termination – if terminated – for seventy-five named company employees.

2. All employee manuals and organizational manuals and charts which show the lines of authority among the Company's officers and supervisors.

3. Job descriptions or other documents describing work or responsibilities of supervisors and leadmen.

4. Names of all people hired or rehired in 1964 in the Company's production departments, names of employees transferred, names of employees discharged.

5. Literature of the Union organizing committee in the Company's possession.[5]

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[5] Items 3 and 5 of the subpoena are not involved in this proceeding.

Pursuant to Item 1 of the subpoena, both the General Counsel and the Trial Examiner asked the Company's Assistant Personnel Manager to produce the payroll record for the "blade department" (S.A. 3-5). Item 1, however, does not mention the "blade department," but merely requests payroll and personnel records for 75 designated employees and supervisors. When the Company's attorney attempted to alert the Trial Examiner to this discrepancy, the Examiner noted that production of the records had been refused and that he would draw his own inferences therefrom. (S.A. 6, 8). Later, when the Union requested the personnel records of a specific individual, the Company produced the file, stated that it would not permit a "free-for-all" inspection by the opposition, but agreed to an inspection by the Trial Examiner (S.A. 10). After examining the file, the Examiner opined that "the anticipation of finding things in here which you may hope to find is unwarranted . . ." (S.A. 12). The Examiner, voicing his reluctance to "just turn the file over for a general fishing expedition for whatever may appear in here," (S.A. 11) suggested that the Union and General Counsel question from a summary "blue card" form[6] in the personnel files of the alleged discriminatees, further advising that the proper forum for enforcement of the subpoena was in the District Court. (S.A. 12). The General Counsel, however, proceeded with the presentation of his case and did not seek enforcement of the subpoena in Court. Thereafter, the Union requested the personnel folder of each alleged discriminatee, and the Company offered the "blue card" but refused to furnish any other portions of the personnel records. (S.A. 13). The Company's offer was rejected by the Union on the ground that it was not a Company record and rejected by the General Counsel on the ground that it was self-serving (S.A. 14, 15).

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[6] The card contained dates of job classifications and wages paid, together with attendance records (R. Exh.-IV-170-171).

With respect to the second item of the subpoena, the General Counsel, at one point in the hearing, asked the Company's Assistant Personnel Manager if the Company maintained manuals and charts describing lines of authority, but withdrew the question before it was answered (S.A. 8). When requested by the Union, the Company produced an organizational chart, which was identified as an exhibit of the Union (S.A. 15, 16-17). The exhibit was further identified as a current chart covering the structure of the "fabrication" department, which apparently included many of the departments in which the alleged discriminatees involved herein worked. It was explained that the chart was current and that only a current chart was maintained (S.A. 16). The Union, however, did not introduce the chart into evidence (S.A. 17); instead, after having an opportunity to examine the chart, the Union refrained from questioning about it.

With respect to item four of the subpoena, the General Counsel asked at another point in the hearings if the Company had a list of employees transferred into "the classifications occupied previously by the laid-off employees" and, upon obtaining an affirmative response, the matter was dropped (S.A. 9). Neither the General Counsel nor the Union requested at any time during the hearing that the list be produced. With respect to a list of employees hired or rehired by the Company in 1964, the General Counsel asked whether the Company maintained such a list for the blade and packaging departments and was informed that the list was available but that it was not then in the hearing room (S.A. 3). The General Counsel next inquired about a list of individuals hired in 1964 as inspectors, expediters, technicians, etc. in specified departments and was advised that the requested data existed and was in the hearing room (S.A. 3-4). Notwithstanding the Trial Examiner's suggestion that the General Counsel "call for the production of the records if . . . relevant" (S.A. 4), the General Counsel did not request their production, then, or at any subsequent time during the hearing.

II. THE BOARD'S CONCLUSIONS ON REMAND AND ITS SUPPLEMENTAL DECISION

On the basis of the foregoing facts, the Board concluded on remand that, under the circumstances, "there was no failure to draw adverse inferences [from the nonproduction of certain subpoenaed documents] which was prejudicial to any party." (S.A. 39). Accordingly, the Board adhered to its original Decision and Order, dismissing the complaint in its entirety (D & O-IV-75).

ARGUMENT

THE BOARD'S FAILURE TO DRAW ADVERSE INFERENCES FROM THE NONPRODUCTION OF CERTAIN SUBPOENAED DOCUMENTS WAS A REASONABLE EXERCISE OF THE BOARD'S DISCRETION

As noted in the Counterstatement of the Case, *supra*, p. 3, this Court's remand of the original Board decision directed the Board to "(1) explain its failure to draw the requested inferences, (2) draw the inferences and explain the consequences or (3) require production of the records." The Board, upon an examination of the entire record, selected the first alternative and supported its choice on a number of grounds detailed *infra*.

In justifying an apparent departure from its normal practice of drawing appropriate inferences from the nonproduction of requested documents, the Board cited, *inter alia*, the Company's substantial compliance with the terms of the subpoena. Thus, with respect to item 1 of the subpoena, the Company, though refusing to make available its personnel records for a *carte blanche* inspection by the opposition, did offer to produce summary "blue cards" which contained dates of job classifications and wages paid, along with attendance records. Both the General Counsel and the Union rejected the Company's offer, eschewing the opportunity to

interrogate the Company's witnesses on the basis of information provided by the cards. As the Board observed: "In this regard, the blue card summary for each employee could have been compared as to job description, rates of pay, supervisory authority, and other matters, and responsibility for failure to do so cannot now be attributed to . . . [the Company]." (S.A. 37).

As the Court noted, payroll and personnel records were relevant in seeking to show reasons for the discharges. However, General Counsel's Exhibit 11, on its face, discloses the names, positions, dates of terminations and reasons therefor of employees terminated between January 1, 1964 and October 31, 1964 (G.C. Exh. IV-100-115). Moreover, as the record reflects, the reasons for the terminations, as stated on that exhibit, were compiled from Company personnel records (S.A. 14). The Company's submission, pursuant to the General Counsel's request, of a list of employees terminated during the relevant period with a statement of reasons therefor constitutes substantial compliance with item 1 of the subpoena.

Even assuming, however, that the documents furnished or offered the General Counsel by the Company did not substantially comply with the General Counsel's request for the Company's reasons for the terminations, it is not clear, as the Board noted, how the Company's failure to supply the employees' complete personnel folders is prejudicial—particularly in view of the fact that General Counsel's Exh. 11 explicitly states the Company's reasons for the discharges. In addition, neither the General Counsel nor the Union suggested exactly what inference can reasonably and fairly be drawn from the Company's failure to furnish the entire personnel folder. Nor did the General Counsel or Union indicate what relevant information, apart from the data compiled in G.C. Exh. 11 and the "blue

cards", the employees' files would contain.[7] Accordingly, the Board reasonably concluded that the inference apparently implied by the Union—that the personnel files would establish that the employees' union activities precipitated their discharges—is clearly not supportable on the record.

The Company, we submit, also substantially complied with the General Counsel's request in item 2 of the subpoena, for "[employee] . . . and organizational manuals and charts which show the lines of authority among [the Company's] officers and supervisors." The General Counsel, upon receipt of an affirmative response to his question whether the Company maintained such manuals, withdrew the question and thereafter failed to request the production of the charts. The General Counsel's withdrawal of the question reflects an apparent belief that the manuals and charts would not be necessary or helpful to his case. Pursuant to a similar request from the Union, the Company did produce an organizational chart, which was identified as a Union exhibit but not introduced into evidence In fact, though afforded ample opportunity to examine the chart, the Union elected not to question the Company's witnesses about it. Accordingly, it is apparent that the Company honored the Union's request to furnish organizational charts; the Union's failure to elicit meaningful testimony about the charts cannot now be attributed to the Company—nor may the Board properly rely upon an alleged noncompliance with the General Counsel's request to support the inference – invoked by the

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[7] The Union belatedly suggests that the personnel files of the alleged discriminatees may "have shown any written warnings administered to the UAW members allegedly discharged for cause" (Br., p. 14). The absence of written warnings, of course, does not necessarily impugn the veracity of the Company's stated reasons for the discharges, but even assuming the relevance of such information, the Union's parenthetical interposition, in its brief, of a purported reason for production of the files cannot excuse its failure at the hearing to indicate the information which the personnel files might reasonably be anticipated to disclose.

Union—that the Company's leadmen were supervisors or agents of the Company within the meaning of the Act.

The Union apparently assigns error to the Board's "devo[tion] [of] the bulk of its decision to explaining why it failed to draw inferences from Gyrodyne's withholding of employee payroll and personnel records and certain organizational manuals and charts" in light of the fact that the Union directed its argument "almost entirely [to] the Company's refusal to produce the rehiring records [item 4 of the subpoena—discussed *infra*]" (Br., pp. 7, 14). The Union, of course, cannot restrict the Board's consideration of the issues to those the Union deems relevant but, in any event, the Union's characterization of the issue of the replacement of the laid-off Union members as "the central question" (Br., p. 14) overlooks the fact that "the Union's" issue need not even be reached if the General Counsel has failed to establish, by a preponderance of the evidence, Company knowledge of the Union activities of the alleged discriminatees—an essential element of his *prima facie* case (See discussion, *infra,* pp. 21-22). The data relating to the replacement of the laid-off employees, the non-production of which (and the inferences flowing therefrom) the Union chiefly relies upon to support its allegations of discriminatory discharge, bears no relationship to the critical threshhold question of Company knowledge of employees' union activities.

With respect to the fourth item of the subpoena, the General Counsel, at one point in the hearing, queried whether the Company had a list of employees transferred after June 1964, and, upon obtaining an affirmative response, allowed the matter to drop (S.A. 9). The General Counsel also inquired about a list of employees hired or rehired in 1964 but did not pursue the matter when informed of the eixistence of the list. Although the Company did not in fact provide such a list, credited testimony establishes that no employees were hired in the production

and maintenance departments since June 30, 1963 (TXD-IV-15; S.A. 27). The record also discloses that, subsequent to the alleged discriminatory discharges herein, further terminations occurred which were not even alleged as discriminatory. In addition, there was credited testimony that the total number of employees fell substantially between the time of the alleged discriminatory layoffs and the time of the hearing (S.A. 24). In view of the credited testimony adduced by the Company and uncontroverted by the General Counsel or Union, the Board was justified in refusing to draw the inference that the list, if produced, would have established that employees were, in fact, hired, rehired or transferred at the material times. Cf. *N.L.R.B. v. Drennon Food Products Co.*, 272 F.2d 23, 27 (C.A. 5, 1959).

The Company's introduction of credited secondary evidence establishing that no additional employees were hired, or no terminated employees rehired, in the relevant period renders less significant the documentary evidence the Company failed to produce. It is settled that no unfavorable inference arises from a failure to produce evidence where "the contents of a desired instrument are fully and satisfactorily proved by other evidence". I Jones, *Evidence*, Sec. 29 p. 63 (3rd ed., 1940), cf. *Berthold-Jennings Lumber Co. v. St. Louis, I.M. & S.Ry Co.*, 80 F.2d 32, 41, 42 (C.A. 8, 1935). As aptly stated by Jones: "The fabrication or suppression of evidence is a fact to be considered in view of all the circumstances of the case. *It may become unimportant by reason of other and perfectly satisfactory evidence of the fact or document supressed* . . . [emphasis supplied]" I Jones, *Evidence*, Sec. 30, p. 65. Accord: 29 Am Jur 2d, Evidence, §179, p. 224 (2d ed., 1967) ("[N]o adverse inference can be raised against a party for failure to produce books or papers, where secondary evidence fully establishes their contents so far as they are material"). Cf. *Walker v. Herke*, 20 Wash. 2d 281, 147 Pac. 2d

255, 261 (1944); *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 28 N.E. 932 (1891); *Rossiter v. Boley*, 13 S.D. 370, 83 N.W. 428-429 (1900).

The Union contends that "the Board's reliance on the oral testimony of Gyrodyne's witnesses to justify nonproduction of documentary evidence demonstrates most forcibly that the Board does not understand the principle at issue" (Br., p. 12). Yet, the authority (*infra*, pp. 16, 17) is clear that the Board was entitled to rely on the uncontroverted testimony of the Company's witnesses, which rendered less significant the documentary evidence whose nonproduction the Union now relies upon to establish that employees were, in fact, hired, rehired or transferred during the critical period.[8]

The Union, in effect, invokes the "Best Evidence Rule" to preclude the Board's reliance on credible, secondary evidence. Even assuming *arguendo*, without conceding, the applicability of the best evidence rule in the instant case, neither the General Counsel nor the Union objected at the hearing to the form in which the evidence was introduced.[9] The failure of the General Counsel and Union to object at the hearing to the testimony of the Company's witnesses on the ground that it was not the "best evidence" precludes its raising this point on appeal. See *Long Island R. Co. v. United States*, 307 F. Supp. 988, 994 (E.D. N.Y., 1969) ("Even if the best evidence rule were applicable to the circulars, failure to object to presentation of statements about the circulars without the

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[8] If the secondary evidence relied upon by the Board were "vague, imperfect [or] uncertain", then the Board would have been warranted in drawing inferences "against the party who might remove all doubt by producing the higher evidence" *Hanson v. Eustace*, 43 U.S. (2 How. 665) 653, 708 (1844). The Union does not contend, however, that the secondary evidence was ambivalent or "uncertain."

[9] An objection by the party against whom the secondary evidence is offered is necessary to bring the best evidence rule into operation. *United States v. Alexander*, 326 F.2d 736, 741 (C.A. 4, 1964), I Jones, *Evidence*, Sec. 234, p. 452.

circulars having been admitted, waived objection to such statements"). Accord: *Gonns v. United States,* 231 F.2d 907, 909 (C.A. 10, 1956) (". . . [I]n the absence of objection [to the introduction of secondary evidence], an essential fact may be established by secondary evidence . . . [citation omitted]"), *Simmons v. Stern,* 9 F.2d 256, 257 (C.A. 8, 1925) and cases cited therein. Cf. *N.L.R.B. v. Local 490, Hod Carriers,* 300 F.2d 328, 333 (C.A. 8, 1962), *Blas v. Talabera,* 318 F.2d 617, 621 (C.A. 9, 1963), *Chicago & N.W. Ry. Co. v. Green,* 164 F.2d 55, 63 (C.A. 8, 1947).

Even assuming, however, that the point raised by the Union is sufficiently preserved on appeal, we submit that the Union has misconceived the nature and purposes of the best evidence rule which, in fact, is not applicable in the instant case. As the court in *Maier v. Publicker Commercial Alcohol Co.,* 62 F. Supp. 161, 167 (E.D. Pa., 1945), aff'd. 154 F.2d 1020 (C.A. 3, 1945) explained:

> The "best evidence" rule is one of preferential evidence requiring that where a party seeks *to prove a writing for the purpose of establishing its terms,* production must be made of the writing itself unless the nonfeasibility of production is satisfactorily established. Since libellant does not seek to establish the contents of the social security or other business records, the rule has no application here. Maier is competent to testify as to the wages paid so long as the facts are with his own knowledge. It may be true that libellant's business entries might be entitled to greater probative force than his oral testimony, but the business records are not preferred over oral testimony . . ." (emphasis supplied).

Accord: *Allen v. W.H.O. Alfalfa Milling Co.,* 272 F.2d 98, 99-100 (C.A. 10, 1959) ("Applying this rule [the best evidence rule], courts exclude testimony when the knowledge from which the witness testifies is derived from the writing [citation omitted]. But in further application, courts

do not bar oral proof of a matter merely because it is also provable by writing"). Cf. *Farmer v. Commissioner of Internal Revenue,* 126 F.2d 542, 544 (C.A. 10, 1942) (failure to produce documentary evidence "goes only to the weight to be accorded" oral testimony, but "does not destroy its competency"). See also *Sterling Aluminum Co.,* 163 NLRB 302, 332 (1967). Similarly, in the instant case, the Company's witnesses testified from *independent* knowledge of facts also evidenced by the records themselves[10] and, in accordance with the authority cited above, the Board, in its discretion, may credit the secondary evidence consistently with either the adverse inference rule or the best evidence rule.

Indeed, it has been held that the trier of fact may not arbitrarily or capriciously reject the testimony of witnesses who have not been impeached or discredited. See, e.g., *Chesapeake & Ohio Ry. v. Martin,* 283 U.S. 209, 216 (1931); *Dickinson v. United States,* 346 U.S. 389, 396-397 (1953); *N.L.R.B. v. Drennon Food Products Co., supra,* 272 F.2d at 27, ("We do not think that either the Trial Examiner or the Board had the power to reject undisputed testimony because of suspicion . . .") Cf. *N.L.R.B. v. Audio Industries, Inc.,* 313 F.2d 858, 863 (C.A. 7, 1963). Here, the testimony of the Company's witnesses was not shaken by cross-examination, nor was its accuracy controverted by proof adduced by the Union. No substantial basis exists for discrediting testimony which was not inherently improbable or incredible nor which "carrie[d] its own death wound." *Pittsburgh S.S. Co. v. N.L.R.B.,* 337 U.S. 656, 660 (1949); *N.L.R.B. v.*

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[10] As in *Maier v. Publicker Commercial Alcohol Co., supra,* the party invoking the "best evidence" rule (i.e., the Union) does not seek to establish the *terms or contents* of the records but the fact of replacement of the alleged discriminatees–a fact which may be evidenced by both the oral testimony and the subpoenaed records. Under *Maier,* the latter is not preferred over the former. See also *Meyers v. United States,* 84 U.S. App. D.C. 101, 113, 171 F.2d 800, 812 (1948), cert. denied, 336 US 912; *Sayen v. Rydzewski,* 387 F.2d 815, 819 (C.A. 7, 1967).

Robbins Tire & Rubber Co., 161 F.2d 798, 800 (C.A. 5, 1947). The Union, however, in an effort to create prejudicial error from the events of the hearing, contends that the Company's failure to produce its hiring records requires the Examiner to discredit the Company's subsequently adduced oral testimony and to draw adverse inferences from the nonproduction. The General Counsel, it may be emphasized, rested his case without requesting production of the documents, did not object to the introduction of secondary testimony, and did not attempt to refute the Company's testimony by cross-examination or by presentation of rebuttal evidence. Under the circumstances, the Company's nonproduction of requested documents does not significantly impair the credibility of its oral testimony elicited *after* the General Counsel rested his case. Accordingly, the secondary evidence provided a valid basis for the Board's concluding that it would not draw an adverse inference from the failure to produce documents concerning the hiring in the production and maintenance departments and for the Board's finding that no employees were hired in these departments to replace the alleged discriminatees.

Additional support for the Board's position is derived from evidence that the General Counsel, although specifically so advised by the Trial Examiner, did not seek enforcement of the subpoena in District Court. Nor does the record indicate that the Union either urged the General Counsel to seek enforcement or attempt to serve its own subpoena covering the same materials requested by the General Counsel. The General Counsel's election to proceed with the presentation of his case, and not to seek enforcement of the subpoena in the appropriate forum, may properly be deemed to preclude an appeal to the Board to draw the requested inferences. As we stated in our earlier brief (in No. 22,186), the record discloses "that the Union was content to allow the unfair labor practice hearing to proceed in the manner in which it did and it was only after a decision adverse to its views issued that it sought to create prejudicial

error from the events of the hearing." (at p. 60). Cf. *Baker Machinery Co.*, 184 NLRB No. 39 (Slip. op., p. 1-2, fn. 1); 74 LRRM 1519 (1970).

The Union attributes the General Counsel's failure to seek enforcement of the subpoena in the appropriate forum to his reliance on the Trial Examiner's assurance that "I will draw my own inferences from the refusal" to produce (Br., pp. 15, 16). The Union would have the Trial Examiner's statement read by this Court to mean that the Trial Examiner committed himself not only to draw an adverse inference from failure of the Company to produce documents bearing on hiring and rehiring but furthermore to use this inference to conclude that the Company had discharged employees in violation of Section 8(a)(3) in spite of the fact, as we show *infra*, that the elements of a *prima facie* case had not been established. The Union, in effect, contends that the Examiner (and Board) is estopped from refusing to draw inferences ("The General Counsel and the Union were entitled to rely on the Trial Examiner's assurance"–(Br., p. 16) because the General Counsel and Union relied–to their asserted prejudice–upon the Examiner's representations. Even assuming that the doctrine of equitable estoppel is applicable, (see *N.L.R.B. v. T.W. Phillips Gas & Oil Co.*, 141 F.2d 304, 305,(C.A. 3, 1944)) the Trial Examiner here specifically advised the General Counsel to seek compulsory process in district court if he deemed the records essential to his case. Accordingly, the General Counsel and Union's "reliance", if their conduct may be so characterized, was not reasonable under the circumstances and cannot excuse their failure to seek enforcement of the subpoena if their self-interest so demanded.

Although it is established that the nonproduction of subpoenaed documents or material witnesses authorizes an inference that, if produced, the documents would have been unfavorable to the party withholding the

evidence, it is equally established that no such adverse inference is permissible where the party relying upon the inference has failed to make out a *prima facie* case. See, e.g., *Northern Ry. Co. v. Page*, 274 U.S. 65, 74 (1927), *U.S. v. Mammoth Oil Co.*, 275 U.S. 13, 52 (1927) (". . . [The] failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case"). *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F.2d 480, 486 (C.A. 2, 1962) (". . . [T]he inference from the nonproduction of evidence cannot be availed of by a party having the burden of persuasion 'until the burden of producing evidence has shifted' " (citation omitted)), *United States v. Cherkasky Meat Company*, 259 F.2d 89, 93 (C.A. 3, 1958) (". . . [W]here the totality of plaintiff's evidence does not even spell out a *prima facie* case, no inference arises from the fact that defendants did not present evidence."). Accord: *Sheridan v. Perpetual Building Association*, 116 U.S. App. D.C. 205, 208, 322 F.2d 418, 421 (1963) (". . . Sheridan is not to be charged with knowledge . . . merely because he did not take the stand and deny such knowledge. The trustees had the burden of showing he was fully informed."), *Steiner v. Commissioner of Internal Revenue*, 350 F.2d 217, 223 (C.A. 7, 1965); *San Antonio v. Timko*, 368 F.2d 983, 985 (C.A. 2, 1966). In short, it is apparent that the inference does not operate to relieve the party, upon whom rests the burden of proof, of the obligation of establishing his case.

The Union cites numerous cases in which the "adverse inference" rule was applied (Br., pp. 9-10)—but under circumstances inapposite herein. Thus, in many of the cases, including the "authorities chiefly relied upon" by the Union (Br., p. ii), the court stipulates that the adverse inference arising from nonproduction of relevant documents or material witnesses does not come into play where the party which invokes the inference has the burden of proof and fails to establish a *prima facie* case. Thus, in

Tendler v. Jaffee, 92 U.S. App. D.C. 2, 7; 203 F.2d 14, 19 (1953), the Court concluded that the adverse inference rule "is not strictly pertinent to our present inquiry" where the party invoking the inference failed to satisfy his burden of proof on the issue in question. Similarly, in *Inter state Circuit v. United States*, 306 U.S. 208, 226 (1939), the Court asserted that the *only* effect of the inference arising from the defendants' failure to call material witnesses was to *strenghthen* the *prima facie* case already established by the Government upon whom rested the burden of proof. And in *N.L.R.B. v. A.P.W. Products Co.*, 316 F.2d 899, 903 (C.A. 2, 1963), the Court stated explicitly that an inference from nonproduction of evidence within a party's control arises only when a *prima facie* case has been created: "Dagan['s] . . . testimony sufficed to create a *prima facie* case, and this would have made available the strong supporting inferences from A.P.W.'s failure to call witnesses primarily available to it . . ." (citing *Interstate Circuit v. United States, supra.*).

It is apparent, therefore, that the authority relied upon by the Union is inapposite in the instant case where the General Counsel failed to sustain his burden of proof. The General Counsel cannot invoke the inference to cure a deficiency in his case–i.e., the failure to establish Company knowledge of the Union activity of the alleged discriminatees, clearly an essential element of the General Counsel's *prima facie* case.[11] See *Dubin-Haskell Lining Corp. v. N.L.R.B.*, 375 F.2d 568, 573 (C.A. 4, 1967), cert. den., 393 U.S. 824 (". . . proof of the Company's knowledge of an employee's union activity is

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[11] As the Fifth Circuit observed with respect to the effect upon the Government's burden of proof of an inference flowing from the failure of a party to testify: "It is . . . well-settled . . . that the failure of a party to testify and the permissible inference to be drawn therefrom will not convert evidence otherwise insufficient into a *prima facie* case. It will not excuse a failure of the Government to meet the burden of establishing facts sufficient to make out a case . . ." *U.S. v. Roberson*, 233 F.2d 517, 519 (C.A. 5, 1956). Quoted with approval in *Transcontinental Gas Pipe L. Corp. v. Mobile Drill Barge*, 424 F.2d 684, (C.A. 5, 1970). See also *U.S. v. Priola*, 272 F.2d 589, 594 (C.A. 5, 1959).

essential to the establishment of a discharge as discriminatory") Accord: *Int'l Ladies Garment Workers v. N.L.R.B.*, 99 U.S. App. D.C. 64, 71; 237 F.2d 545, 552 (1956). And in *N.L.R.B. v. Century Broadcasting Corp.*, 419 F.2d 771, 776-777 (C.A. 8, 1969), the Court, in denying enforcement of a Board order, criticized the Board for drawing an inference of Company knowledge of union activities from its failure to produce witnesses to deny knowledge: "It was up to the General Counsel for the Board to prove that the Company had knowledge of the activities and where the Board has not succeeded in proving this, knowledge cannot be inferred simply because the Company did not put on any witnesses to deny it." To permit an inference in the instant case that the subpoenaed documents, if produced, would establish Company knowledge of the Union activities of the alleged discriminatees would be tantamount to shifting the burden of proof on this issue from the General Counsel to the Company. Cf. *Alton-Arlan's Dept. Store, Inc. v. N.L.R.B.*, 355 F.2d 513, 516 (C.A. 7, 1966).

Only where the General Counsel has satisfied his burden of proof may an inference arising from nonproduction of subpoenaed documents be appropriately drawn. Moreover, even where appropriate, such inferences are only permissive, and not mandatory presumptions of law[12] and

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12 The Union insists, on the other hand, that the inference is a "mandatory evidentiary presumption" (Br., p. 11). Citing no authority to support such a bald legal proposition, the Union notes, with presumably unwitting irony, that "[W]e find it most revealing that for the contrary principle espoused by the Board it cites not a single authority." In addition to the cases cited, *infra*, p. 13, many of the cases relied upon by the Union (Br., pp. 9, 10) support the Board's position that the inference is only permissive. See, *e.g.*, *Interstate Circuit v. United States, supra*, 306 U.S. at 226 (failure to call witnesses in position to know "is itself persuasive"), *Tendler v. Jaffee, supra*, 203 F.2d at 19 (presumption "aids the case"). See also *Washington Gas Light Co. v. Biancaniello*, 87 U.S. App. D.C. 164, 167, 183 F.2d 982, 985 (1950) (spoliation "permits" the inference), *N.L.R.B. v. Wallick*, 198 F.2d 477, 483 (C.A. 3, 1952) and *Monahan Ford Corporation of Flushing*, 173 NLRB No. 37 (Slip op., p. 9), 69 LRRM 1279 (1968) (Board "warranted" in drawing inference).

are not binding upon the trier of fact. See, *inter alia, Foust v. Munson S.S. Lines,* 299 U.S. 77, 86 (1936), *Kirby v. Talmadge,* 160 U.S. 379, 383 (1896), *Hanson v. Eustace; supra, Aetna Casualty and Surety Co. v. Smith,* D.C. Mun. App. 127 A.2d 556, 559 (1956). Accordingly, no prejudicial error may be assigned to the Board's failure to infer that the records, if produced by the Company, would have been unfavorable to the Company's case.

In sum, the Board's conclusion that it was unnecessary to draw adverse inferences from the nonproduction of certain subpoenaed documents is clearly warranted in view of the record evidence that the Company substantially complied with the terms of the subpoena, that the General Counsel elected to proceed with the presentation of his case rather than, as advised by the Trial Examiner, seek enforcement of the subpoena in the appropriate forum, and that the Company introduced, without objection by the Union or General Counsel, uncontroverted, credited testimony establishing certain relevant facts also evidenced by the subpoenaed documents. Moreover, the failure to produce is only a fact to be considered in view of all the circumstances of the case – (See *e.g., Aetna Casualty and Surety Co. v. Smith, supra*) ("The inference arising from the refusal or unexplained failure to produce relevant documentary evidence . . . is merely another factor which may be given consideration by the trier of facts when weighing the evidence and determining the credibility of witnesses [citations omitted]") – a fact which would have assumed more significance had the Company's oral testimony been unreliable or "imperfect". See *Hanson v. Eustace, supra, Mid States Sportswear, Inc.*, 168 NLRB 559, 560 (1967); *Crow Gravel Co.*, 168 NLRB 1040, 1047 (1967), I Jones Evidence, Sec. 30, p. 65. Even assuming, however, that adverse inferences could appropriately be drawn, such inferences, by the great weight of authority, cannot serve as a surrogate for substantive proof of any fact essential to the case of the party invoking the inference. As

outlined above, the General Counsel failed to prove, by a preponderance of the evidence, Company knowledge of the Union activities of the alleged discriminatees. Such deficiency of proof cannot be cured by the invocation of the inferences flowing from the nonproduction of subpoenaed documents since, to do so, would improperly relieve the General Counsel of his burden of proving affirmatively all essential elements of his case. Cf. *Baker Machinery Co., supra* (Slip. Op., p. 10).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition to review the Board's order should be denied.

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April 1971.

SUPPLEMENTAL APPENDIX

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

(PAGE REFERENCES ARE TO THE ORIGINAL TRANSCRIPT)

[Pages 77, line 14 to Page 77, line 22]

DIRECT EXAMINATION

Q. (By Mr. Leiner) [Counsel for the General Counsel] Will you tell the Trial Examiner, Mr. Zafrano, whether you recall that there was an election held at the Gyrodyne plant conducted by the National Labor Relations Board soon after you were employed? A. [Michael Zafrono] Yes, sir. In June. June of 1962, if I recall the exact date. I recall the exact date for several reasons. June 14th is Flag Day, and my brother's birthday. We observe birthdays pretty close in our family. We had an election on June 14, 1962.

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Page 103, line 5

DIRECT EXAMINATION

Q. (By Mr. Leiner) What did Mr. Papadakos say the second time?

* * * * *

Page 103, line 11 to Page 103 line 14

A. [Michael Zafrano] He says, "Like I said yesterday, we have had some lean years and we may have some more, and we may have to con-

consolidate and tighten our belts and we will probably start having some lay-offs." In that general line.

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Page 298, Line 10 to Page 299, line 8

DIRECT EXAMINATION

Q. (By Mr. Leiner) Thereafter did you have a conversation with any supervisor regarding the union? A. (Urbano Carl Giovanniello) Yes, I did.

Q. With whom did you have that conversation? A. I had a conversation with Mr. Alfieri, who was the motor pool supervisor or foreman or whatever you want to call him.

Q. Where did you have this conversation with Mr. Alfieri?

A. In an anteroom adjacent to the packaging section.

Q. Was that near the motor pool? A. Yes, sir.

Q. How far from the motor pool was it? A. About 18 inches.

Q. Would you tell the Trial Examiner what Mr. Alfieri said to you and what you said to Mr. Alfieri? A. Mr. Alfieri said to me that someone had told him that I was a union organizer, and naturally I denied it because I was not organizing anyone. He asked me if we had ever discussed it and I said yes, we did discuss the union and we were curious to the aspects of it.

And then he told me, when I denied being an organizer, that he was very glad to hear that I had not been an organizer.

Q. Did he ask you if you had signed a card? A. Yes, he did, and I told him I had signed a card.

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Page 383, line 6 to Page 384 line 16

DIRECT EXAMINATION

Q. (By Mr. Leiner) Do you have the records of all persons hired or rehired by the company in the period January 1, 1964 to December 31, 1964, in the Blade Department? A. (William J. Aylward, Jr.) The records are in existence. Do you mean are they here?

Q. Are they right here? A. No.

Q. Do you have the records of persons hired in the Packaging Department? A. When?

Q. In the period January 1, 1964 through December 31, '64?

A. The records are in existence.

Q. But they are not in this room? A. No.

Q. I will make the same request with regard to persons who worked as inspectors in the shipping and receiving department and in the packaging department – A. If you are asking me in general, are records available –

Q. Let me finish my question, Mr. Aylward, please. Who worked as expediters, mechanical inspectors, electronic technicians, drill press operators, calibration technicians, blade mechanics, machinists, lathe operators; do you have any of the records for persons hired in the period January 1, '64 through December 31, '64? A. Any of the records?

Q. Any of those records? A. Yes.

Q. In this room? A. Yes.

Q. Do you have their names and last known addresses?

MR. CURLEY [Co-Counsel for the Respondent]: Mr. Trial Examiner –

TRIAL EXAMINER: Why don't you call for the production of the records if they are relevant? Take a five-minute recess. You may step down if you care to, Mr. Aylward. Please don't discuss your testimony.

* * * * *

Page 391, line 11 to Page 392, Line 13

Q. (By Mr. Leiner) What did you pay any employee hired by you as a blade shop employee in the period January 1, 1964, to June 30, 1964? A. On a memory basis, I wouldn't be able to recall.

Q. Do you have the records here that would refresh your recollection? They have been subpoenaed, Mr. – A. Those records were not subpoenaed.

MR. CURLEY: Just a moment. When you make a statement, would you direct your attention to the item?

MR. LEINER: I will be happy to –

MR. CURLEY: Let me finish my remark.

Will you direct your attention to the item of the subpoena you are talking about?

MR. LEINER: Paragraph 1 – excuse me.

TRIAL EXAMINER: I thought you wanted the payroll records for the Blade Department for the period you mentioned?

MR. LEINER: Right.

TRIAL EXAMINER: Do you have that here?

MR. CURLEY: They haven't been subpoenaed.

TRIAL EXAMINER: Do you have the payroll record for this period for the Blade Department with you?

MR. CURLEY: I don't know. You will have to direct that question to the witness, but I will say this. They have not been subpoenaed.

THE WITNESS: I do not have the payroll records.

Q. Could you get them? A. I presume I could.

* * * * *

Page 394, line 15 to Page 396, line 21

MR. LEINER: Would you also bring in the payroll records of the employees hired in the period January 1, '64 through July 31, '64, payroll of blade mechanics hired.

MR. CURLEY: No. You have to subpoena that, Mr. Leiner.

MR. LEINER: I am asking you whether you will produce it.

MR. CURLEY: I have been instructed by the Trial Examiner not to engage in any discourse with you.

MR. LEINER: You are quite right, Mr. Curley. I apologize to the Trial Examiner.

TRIAL EXAMINER: Mr. Curley, are you prepared to supply the information called for in Item 1 of the rider to the subpoena which has been marked General Counsel's Exhibit 10, that's the subpoena duces tecum directed to Mr. Aylward.

MR. CURLEY: In situations where it is ruled relevant, yes.

TRIAL EXAMINER: Well, now, we want to know the comparative rates of pay, hourly rates of pay for the employees in the blade department

from January 1 through July 31, 1964.

That's the first item that's called for.

MR. CURLEY: This is a request different from any contained in the subpoena.

MR. LEINER: Absolutely not, sir.

TRIAL EXAMINER: Will you stop arguing with me?

Mr. LEINER: Yes, sir.

TRIAL EXAMINER: It is encompassed within the demand. The subpoena requests such payroll, personnel records for the period January 1, 1964 and it is an overall request which must necessarily include the Blade Department.

MR. CURLEY: It only refers to these people listed underneath.

MR. LEINER: We will accept that, Mr. Examiner, because we have three or four employees in the Blade Department here, including Mr. Martin Pipia, the second name in the third column. The third name, Joseph D'Amato is also a Blade Department employee. We have the names of other lead men by the name of Robert Southworth and Don Karmel in the Blade Department.

These are all Blade Department employees.

TRIAL EXAMINER: If the Company refuses to produce the records, I will draw my own conclusions. I will draw my own inferences from the refusal. You know the law, or should. All you have to say is without a lot of argument, that you refuse to produce the record –

MR. CURLEY: I am not refusing.

TRIAL EXAMINER: Don't equivocate.

MR. CURLEY: My position is completely opposite that. We will

produce anything that's been subpoenaed. However, if all of sudden out of the thin blue air, a request is made that we produce records which would take a long time to assemble and which were not subpoenaed, that we cannot do as of this minute.

TRIAL EXAMINER: Will you please tell me whether or not you will produce the payroll records called for in Item 1 of the subpoena? Will you produce them or not?

* * * * *

Page 397, line 15 to Page 398, line 3

MR. CURLEY: A request was made for material which has not been subpoenaed.

TRIAL EXAMINER: I am asking you about material which has been subpoenaed and if you will read item 1 of the rider, that is what I'm talking about. The records set forth there. And that's all.

I want to know whether you are going to produce those records or not.

MR. CURLEY: We will produce any –

TRIAL EXAMINER: All right, produce them. If they are available, produce them.

MR. CURLEY: We will produce the wage records of any personnel in the Blade Department whose names appear in any of these three columns of names.

* * * * *

Page 399, line 3 to Page 399, line 11

MR. CURLEY: Mr. Trial Examiner, may I state my position for

the record?

TRIAL EXAMINER: You stated it.

MR. CURLEY: There have been shifts here. We are prepared to produce the information. Then a request is made that we produce payroll records of everybody in the Blade Department where no such request was ever made on us in this subpoena and I defy anybody to point to any item that could possibly embrace this.

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Page 399, line 21 to Page 400, line 6

MR. CURLEY: I can't produce all these records, Mr. Trial Examiner.

TRIAL EXAMINER: The production has been refused.

Go ahead.

MR. LEINER: I would just like to state for the record that the subpoena served in this matter was served as far back as –

TRIAL EXAMINER: I know that. You don't have to make a speech.

Go ahead. Desert the subject. It's been refused and I have it in mind and it's been noted on the record.

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Page 402, line 12 to Page 402, line 15

DIRECT EXAMINATION

Q. (By Mr. Leiner to Mr. Aylward) Does the company maintain manuals and charts with regard to the lines of authority and responsibility among the company's officers, supervisors and leadmen?

I will withdraw that question.

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Page 450, line 21 to Page 451, line 4

DIRECT EXAMINATION

Q. (By Mr. Leiner) I believe you testified with regard to the question I asked about persons hired by the company after June 29, 1964. Did you testify that you did not know whether the Company had hired any employees in the classifications in which terminations by lay-off took place on the 19th and 29th of June? A. (Mr. Aylward) There was no new employee hired since the lay-off dates in the classifications occupied previously by the laid-off employees.

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Page 451, line 12 to Page 451 line 23

Q. Would you produce the records of the company with regard to transfers, please, of any employees who worked in those – who were transferred into those job classifications? A. Yes, I think I can do that.

THE WITNESS: May I have a brief moment, Mr. Examiner?

TRIAL EXAMINER: Yes.

(Short pause)

Q. (By Mr. Leiner) To your knowledge, Mr. Aylward, do you know that employees Romand, Galvani and Spicer were expediter-drivers of the respondent under the supervision of Mr. Alfieri?

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Page 467, line 3 to Page 467, line 10

Q. (By Mr. Leiner) Mr. Aylward, I think you testified before that you have the personnel records of the people involved in this complaint;

am I correct? A. Yes, you are.

Q. Will you please give me the record of Ernesto Petito?

MR. CURLEY: Mr. Trial Examiner, we have been through this before. We are not going to produce records in raw fashion. If he wants a particular piece of information –

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Page 470, line 16 to Page 472, line 3

TRIAL EXAMINER: Will you trust me to look at one of those folders?

MR. LYONS [Co-counsel for Respondent]: I certainly would.

TRIAL EXAMINER: This blue card, as I understand it, shows the personal record with respect to his age and social security number and so on.

As I understand it, this shows his history with respect to transfers and increases.

THE WITNESS: It's a quick reference cards.

TRIAL EXAMINER: It's a summary?

THE WITNESS: Yes, in very limited form containing the essential elements.

TRIAL EXAMINER: There are other matters contained within the folder itself which go to his application for employment and certain time and attendance records.

THE WITNESS: Yes. As generally put, that would be the case.

TRIAL EXAMINER: Here we have –

THE WITNESS: It is a check-out form at point of termination. That's a statement which the employee received a copy, a copy by – a copy describing the various amounts he received at or about the time of

termination.

TRIAL EXAMINER: The personnel record of Ernesto Petito, which we have before us here, which I have before me, contains a great deal of information with respect to the assignments that Mr. Petito was given during the term of his employment. It includes the rating of his performance and various other matters in connection with his employment, which I don't think we necessarily need to go into.

Here is a blue card here which contains generally the information in regard to his date of birth, social security number, when he was employed, his address, and it shows the various classifications in which he was employed and the dates on which he was employed, together with his rates of pay.

It seems to me that the blue card itself would be about all you would want to examine from.

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Page 472, line 5 to 472, line 8

TRIAL EXAMINER: I am reluctant to just turn the file over for a general fishing expedition for whatever may appear in here. There is nothing here that really bears on the case that isn't shown by the blue card.

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Page 474, line 22 to Page 476, line 14

TRIAL EXAMINER: Without agreeing completely with everything you say, I am not going to get into that kind of discussion. The situation is this, that the employment records of each one of the alleged discriminatees have been subpoenaed and are here in the court room.

After examination, a quick examination, a cursory examination of the file of Angelo – or Ernesto Petito, it seems to me that there will be no useful purpose served in going through the record, the full record, except by the company regarding his attendance, regarding his pay, regarding his payment of vacation benefits at the time of his termination, and like material which is – appears in the file other than the information contained on the blue card.

That is my opinion. I think that the anticipation of finding things in here which you may hope to find is unwarranted from my glance, Mr. Rubenstein, at the first file. I don't think it will serve any useful purpose by inquiring in connection with each document in it. I think the essential thing, the thing that apparently has been neglected here, is the proof of the discharges of these people and the alleged reasons therefor on the case in chief and the story of the alleged discriminatee himself.

Then I think you might properly, if necessary, call for certain records. You have chosen to adopt a different course. I will say that – I will follow the ruling of the Trial Examiner Lindner and say that the subpoena is proper and should be honored and the petition to revoke has been denied.

I am not going to attempt to reverse that order. I don't think I should. I will simply say that you have the right to call for the employment record under subpoena. If it is refused in its entirety, there is nothing I can do about it. You will have to have recourse to the enforcement of your subpoena in proper form, which is not me. It is the United States District Court.

My suggestion to you is expedite this matter, accept the blue card

in connection with the employment record of each of these people, and start your questioning from there to avoid a refusal on the part of the respondent to produce any part of the employment record of any one of these men. That is my suggestion to you.

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Page 481, line 5 to Page 481, line 25

Q. (By Mr. Rubenstein) [Counsel for the Charging Party] I now ask, Mr. Aylward, that you produce the personnel record of Giovanniello.

TRIAL EXAMINER: Are you going to ask for the personnel records of each and every one of these persons named in paragraph 10(z) of the complaint?

MR. RUBENSTEIN: Yes, sir.

TRIAL EXAMINER: All right, let's make the request for all at one and the same time so we will save some time.

MR. RUBENSTEIN: I ask for each one individually.

TRIAL EXAMINER: They are named in Paragraph 10(a) of the complaint.

If you want to ask for those personnel records, do it.

MR. RUBENSTEIN: I do that.

TRIAL EXAMINER: All right, will you produce them?

MR. LYONS: The respondent will produce, pursuant to the subpoena and pursuant to the suggestion of the Trial Examiner, the blue card records of all of the people named in the complaint that are similar to that exhibit for identification, Respondent's Exhibit 2, and will not furnish any other portions of the personnel records.

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Page 485, Line 1

to General Counsel's Exhibit 11 which is now in evidence.

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Page 485, line 5 to Page 485, line 13

TRIAL EXAMINER: That's a company record. You have it before you.

MR. RUBENSTEIN: This is not a company record. This is an answer given to the General Counsel which the General Counsel offered in evidence. It can only –

TRIAL EXAMINER: It is compiled from company records. I am not going to split hairs with you. That's information furnished to the General Counsel by the Company, compiled from official records. That is the information there. If

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Page 486, Line 7 to Page 486, line 12

TRIAL EXAMINER: I told you that you had before you a company record in the form of information transmitted to the General Counsel at his request by an official representative of the company. That that record, that General Counsel's Exhibit 11 before you, I understand is compiled from the official records of the company,

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Page 487, line 8 to Page 488, line 4

MR. LEINER: I respectfully submit to the Trial Examiner on the assumption that only the cards will be offered for all of these 8(a)(3)'s discriminatees, alleged discriminatees, that – I most respectfully submit that cross-examination of the witness – of any witness under Rule 43(b)

would be hampered to such a degree without having these raw files that it would be impossible to cross-examine within the meaning of the Board's rules and for that matter, the court rules.

However, notwithstanding the position of General Counsel that even under the best of circumstances, to use a self-serving document like that blue card as the only basis of company records to cross-examine the witness in this case with this witness and with this record, I think it would be even more so and I am – and impossible and a futile job on the part of the General Counsel to use these self-serving blue cards without any basis, further basis from the respondent's records to test these blue cards which are only self-serving and therefore General Counsel respectfully declines any examination, any further examination of this witness on such an answer by the respondent to the subpoena.

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Page 489, line 6 to Page 489, line 21

MR. RUBENSTEIN: Yesterday, respondent's attorney said they have a chart of the organizational set-up of the employer.

Q. (By Mr. Rubenstein) Do you know of such a chart, Mr. Aylward? A. We have organizational charts with respect to some departments and also with particular reference to the cost accounting charge operation.

Q. Do you have an organizational chart of the production department showing production employees, lead men, supervisors and so on up the line? A. Yes, we have such a chart.

Q. Do you have it here? A. I do.

Q. May I see it? A. You may.

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Page 490, line 3 to Page 490, line 23

TRIAL EXAMINER: Back on the record.

You were asked to produce an organization chart.

THE WITNESS: I have an organization chart.

MR. CURLEY: I discussed with Mr. Aylward the contents of this organization chart or the situation it portrays and he advises me that it is a current organization chart which I don't think will be of much use to us inasmuch as we are dealing with a situation about a year ago and I am also advised that these organization charts have changed many times since then. Also, there are no organization charts portraying the situation in June of 1964 available, or in existence.

Q. (By Mr. Rubenstein) Mr. Aylward, you heard your counsel's statement about the organization chart that you hold in your hand.

Do I gather that this was prepared only recently? A. This organization chart that I am holding in my hand was prepared and is current as of last Friday from a master chart that is subject to constant revision whenever changes are – have taken place. That being the case, we only maintain those charts that are current.

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Page 494, line 5 to Page 494, line 19

MR. LYONS: I wonder if I could ask if that be marked for identification because there is so much talk concerning it.

MR. RUBENSTEIN: I shall gladly do so.

Do you want to mark it for identification?

TRIAL EXAMINER: Charging party's 3, I believe.

(Thereupon the document above referred to was marked Charging Party's 3 for identification.)

Q. (By Mr. Rubenstein) Mr. Aylward, I understand this is part of the fabrication organization chart as a whole, is that right?

A. That is correct.

Q. Is it correct, too, that the packaging and shipping is part or a section or a department of the entire department, is that correct?

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Page 830, line 17 to Page 830, line 21

DIRECT EXAMINATION

Q. (By Mr. Leiner) Did you ever have a discussion with any of your supervisors with regard to the union? A. (Richard Waltz) Only once. That was right after that union meeting in March. Alfieri asked me about the union, was I at the meeting.

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Page 831, line 7 to Page 831, line 12

Q. What was the conversation? Will you repeat it, please?

A. I – He asked me if I was at the union –

TRIAL EXAMINER: Who are you talking about?

THE WITNESS: Alfieri. He asked me if I was at the union meeting so I said yes. With that, he made a gesture of goodby; that's all.

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Page 831, line 19 to Page 831, line 24

Q. Where did this take place? A. In the receiving department.

Q. Where in the receiving department? A. At the loading

door there.

Q. Was anybody else there when he made the remark?

A. Nobody else was there.

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Page 1172, line 5 to Page 1172, line 8

Q. (By Mr. Leiner) Mr. Martinez, did you attend any meetings of employees addressed by Mr. Papadakos? A. (Robert L. Martinez) Yes, I did. I attended two meetings on June 11th and June 12th, 1964.

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Page 1172, line 23 to Page 1172, line 25

Q. Who addressed those meetings? A. Mr. Papadakos, the president of the company, addressed the meetings.

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Page 1173, line 21 to Page 1174, line 9

Q. Do you remember what he said? A. Yes. Mr. Papadakos spoke of his early life, which was very interesting. And he told about the early struggles and trials and tribulatioins of the Gyrodyne on its way up. And as I remember, he made statements concerning – I am probably going into the second meeting now.

Q. Let's just take the first meeting for a minute. A. He made statements concerning the progress or the possible progress and rosy outlook of Gyrodyne in the future.

Q. When you say "rosy outlook," did he give any examples?

A. Mr. Papadakos indicated – this is very strongly fixed in my mind, that there was enough work for at least two years.

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Page 1178, line 2 to Page 1178, line 11

TRIAL EXAMINER: Did you attend both of these meetings?

THE WITNESS: Yes, I did.

TRIAL EXAMINER: Do you recall at either of these meetings that Mr. Papadakos said anything that had a direct bearing on union activities or organization efforts?

THE WITNESS: This is one thing I can answer with absolute certainty. I was surprised that he said absolutely nothing in my mind using the word "union." The word "union" was not used at all. I was listening for any reference to any type of union and I heard nothing.

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Page 1211, line 16 to Page 1212, line 4

DIRECT EXAMINATION

Q. (By Mr. Leiner) Do you recall what Mr. Papadakos said?

A. (Frank Vella) Yes. He gave a speech telling us how an employee could advance himself through hard work, there would be raises. He also said that there was enough work in the house to carry us through for another two years. He had mentioned that the dollar that we were paying each week for major medical for the married employees would be taken up very shortly by the company. They would pay this dollar. Also, he said that he saw no reason why the company and the employees couldn't get along together as long as this wall didn't come between them; this wall being symbolic of the union.

Q. Did he actually mention the word "union"? A. No, he used the word wall.

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Page 1263, line 1 to Page 1263, line 10

Q. (By Mr. Lyons) Do you remember being at a union meeting in March at which there were ten or eleven people? A. (Lucier Marsar) I remember one meeting where there was about ten or eleven people, ten, fifteen, I don't remember the exact number.

Q. When was that, please? A. I believe that meeting was–let's see, I signed a card in February, the end of February. I attended a meeting then. This meeting would be somewheres around the middle of March.

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Page 1268, line 2

DIRECT EXAMINATION

Q. (By Mr. Leiner) What did Mr. Ackles say?

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Page 1268, line 6 to Page 1269, line 6

Q. Would you tell the entire conversation to the Trial Examiner?

A. (Edward Galvani) He said, "How about wiring?"

I said, "That's all right." I said, "I done plumbing and heating for almost ten years. I know something about wiring."

He said, "Well," he said, "Whatever you don't know we could teach you." He said, "You know the fundamentals."

I said, "Yes."

And he left it at that. We stopped talking for a while. And he was tapping his pencil on the desk and he looked me straight in the eye and he said, "About this union"–so I stopped him right there. I cut in and I said, "Pete, " I says, "I don't know anything about the union." I says, "As far as who is the head of it or anything like that." I says,

"I have been approached several times and I have heard some men talking union but," I says, "as far as I'm concerned," I says, "I worked at Bayliss" –

Q. What is Bayliss? A. Bayliss Fuel Oil Company for nine years with no union and the company was sold out and we got a company union or an amalgamated union, whatever you want to call it, and shortly after, I quit and so did quite a few other fellows. It didn't do us any good. We got a nickel raise per hour. That was the only union I ever had anything to do with and I told him I didn't think much of it.

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Page 1391, line 1 to Page 1391, line 11

DIRECT EXAMINATION

Q. (By Mr. Leiner) Do you remember what Mr. Papadakos said in the first speech? A. (Edward W. Hurley) Yes, sir.

Q. Will you tell the Trial Examiner, Mr. Hurley? A. Mr. Papadakos explained to us how he had started the company and that the – how it had grown every year, that business had doubled up until the last couple of years and then he had a leveling off period of the business and he told us that there was enough work in the company for a minimum of 18 months, possibly two years, and we didn't have to worry about our jobs there for that period.

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Page 1424, line 2 to Page 1424, line 7

TRIAL EXAMINER: On the record.

LEWIS E. URBAN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

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Page 1424, line 15 to Page 1424, line 18

Q. (By Mr. Leiner) By whom are you employed, Mr. Urban?

A. I am employed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.

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Page 1424, line 23 to Page 1425, line 4

Q. What is your title? A. I am an international representative.

Q. Did you commence organizing among the employees of the Gyrodyne Company of America on behalf of the union? A. Yes, sir.

Q. When did you first start? A. In January, 1963.

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Page 1429, line 1 to Page 1429, line 12

A. (By Mr. Urban) The next one is 51-C, leaflet distributed by me at the plant gage on March 5, 1964.

Q. (By Mr. Leiner) 51-D is another leaflet distributed by you –

MR. LYONS: I wonder if I can shorten this up, if Mr. Urban were asked, he would testify that these were either given out or mailed, given out openly. I concede that the company was aware that they were given out. All that might be germane here is the number of them and the dates between which they were given out.

I imagine this is going to run into some 50 or 60 leaflets there.

MR. LEINER: 27 leaflets.

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Page 1447, line 16 to Page 1448, line 24

CROSS-EXAMINATION

Q. (By Mr. Lyons) Do you remember when the letter went out that there were the words in it, "Shake off your apathy and stop thinking that the raw deals and firings will always happen to the other guy only"; do you remember putting out that statement, Lew?

A. (By Mr. Urban) I remember making the leaflet.

Q. Well, I call your attention to the last paragraph of it. Do you remember that? A. Yes.

Q. That's a true statement, wasn't it, that there was apathy as far as your union drive was concerned after 18 months of going on?

A. It wasn't my opinion alone.

Q. It was every one's opinion it was apathy, wasn't it? A. I wouldn't know. I didn't talk to anybody about it.

Q. Well, you had conducted a campaign since January of 1963 and you gave out over 30 leaflets in '63 and you hold some 18 meetings according to testimony of some witnesses here. There must have been a great many more meetings, and in June, 1964, on the 24th to be exact, you held an open meeting after this campaign and eight or ten people showed up; is that right? A. That's true.

Q. That to you would be apathy, isn't that right? A. No, at that time there was a calamity because 30 people were fired.

Q. And on June 24, Lew, only 8 or 10 people showed up at the meeting, isn't that right? A. I didn't hear the question.

Q. I say notwithstanding your last volunteered statement, only eight or ten people showed up at the union meeting, isn't that right?

A. That's right.

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Page 1792, line 17 to Page 1793, line 20

DIRECT EXAMINATION

Q. (By Mr. Lyons) How many employees did you have in 1960?

A. (By Peter Papadakos) On April 30, 1960, we reached 157.

Q. In 1961, how many? A. 256.

Q. 1962? A. 478.

Q. 1963? A. 591.

Q. 1964? A. 814.

Q. 1965? A. 752.

Q. Let me go to the 1964 figure again, it was 841? A. 814.

Q. In 1965, you had how many? A. 752.

Q. What was the greatest number of employees that you ever had?

A. From this it appears, on a fiscal year basis, April, 30, '64, 814. There might be a peak somewhere in between the fiscal year which I'm not aware of.

Q. Do you know how many that you had at the beginning of June 1964? A. Before June, 1964?

Q. Yes. A. Somewhere 814 or less. From April 30 to June '64, I would say it was 814 or less.

Q. Mr. Papadakos, you now have, you say, 752? A. 752.

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Page 1808, line 17 to Page 1808, line 19

DIRECT EXAMINATION

Q. (By Mr. Lyons) In December 1963 did you receive a personal letter from the Secretary of Defense concerning costs? A. (By Peter Papadakos) Yes, sir, I did.

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Page 1810, line 4 to Page 1810, line 15

Q. (By Mr. Lyons) Mr. Papadakos, I showed you and now is in evidence a photostat of a letter from Defense Secretary McNamara.

You received the original of that letter from which the photostats were made, is that correct? A. That's correct.

Q. At the same time in December of 1963 did you receive a personal letter from the White House? A. Yes, sir, I did.

Q. I show you a photostat of that letter and ask you if you received the original of that photostat. A. Yes, sir, I did. I did receive the original.

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Page 1815, line 8 to Page 1817, line 8

Q. (By Mr. Lyons) Can you tell me whether in the latter part of 1963 and going into 1964, whether you were checking on your cost reduction in lieu of the letters that you received and the contracts that you were entering into?

MR. LEINER: Objection. He is leading the witness to an answer directly. The answer has got to be "yes." He specified the date, he specified what else he wanted in the question.

TRIAL EXAMINER: I suppose we better be technical, Mr. Lyons.

Q. (By Mr. Lyons) What, if anything, did you do regarding your cost program in the latter part of 1963 and into 1964, up to and including June of 1964? A. (By Peter Papadakos) The letters had an additional pressure, if we call it, because it was not only the letters but all the Government people had been informed of the drive to cut costs.

My number one step was to send copies of these letters to every employee, photographically produced, and we mailed a copy to every employee. And then I took several technical steps within the company.

Do you wish me to –

Q. I wish you to elaborate at your own length on this. A. First I requested my department heads to examine every area where a work must be done, say for a second and a third time, such as we receive, say, parts from vendors and we inspect them, they are no good, we send them back and they return them again. So I asked that every effort be made to eliminate this situation. I instructed the engineers, tool designers, quality control people participate in an all-out effort to help the vendors to produce a better quality product so that we receive it and we inspect it only once, we don't have to ship it back and forth, and because that is an obvious area of cost reduction.

The second thing is I asked that every operation of ours, either machining or manufacturing or assembly, be re-examined to determine if adequate – if there is adequate tooling, and I told them to proceed, not to worry about tooling money. Tooling will always save man hours and not to look at the tooling account but look if tooling can help accelerate assembly operations or manufacturing operations or increase or improve the quality of the work because quality ties in very closely in the process of assembly in reducing man hours.

I asked the engineering department to determine if any simplifications, any opening of tolerances could be made which in turn reduced manufacturing time and assembly time.

And beyond those points, I asked them to further use their imagination, taking my points as leads, and determine from their own in order to develop a chain reaction.

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Page 1834, line 17 to Page 1835, line 3

Q. (By Mr. Lyons) With regard to the lay-offs, can you tell me this, sir: With regard to the lay-offs in production and maintenance departments that are the subject of the charges here, can you tell me from July 1st 1964 up to and including the present day has any personnel been hired in those departments, either production or maintenance, by the respondent Gyrodyne Company of America? A. No, sir. No one has been hired, and in addition, after these lay-offs, after July 20th, 45 additional people in the same departments have either been laid off or they have resigned or some have been discharged, and no addition, no replacement has been made.

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Page 1836, line 17 to Page 1836, line 19

Q. (By Mr. Lyons) Mr. Papadakos, did you make a speech to the employees in June of 1964? A. Yes, sir.

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Page 1838, line 1 to Page 1838, line 21

Q. At the time that you made this speech had there been for some period of time a union campaign against – rather, an organizational drive regarding Gyrodyne? A. Yes.

Q. And when did that start as regards the UAW? A. I have not personally kept a record, but I understand it started – it was on for about 18 months at this time.

Q. And during that 18 months had you seen many, many throw-aways and leaflets and pamphlets? A. Well, I have seen some. I haven't seen them all, but I have seen some.

Q. During this 18-month period about how many would you say you saw? A. Personally I have seen 20 or 30. Some of that is the standard format. I am used to seeing it.

Q. Since you have been the president of Gyrodyne have you ever had any other unions? A. Yes, sir. We have had two elections and I don't know how many unions. The unions have been – it's one of those standard things. One leaves, the other one comes. Part of our way of life.

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Page 1839, line 17 to Page 1840, line 20

Q. I don't want you to give us the hour and a half speech but I wonder if you would tell us in synopsis form what the speech was about. A. Well, it's always I have the same theme and I always – I am not preparing a speech. I am trying to communicate with the people and trying to see from their reaction how I am going to convey my message, and I always have the same message to convey.

Number one is the facts what we have accomplished, where we are. This is information.

And then tell them what is in the crystal ball. We have one customer and one product. All our efforts to get something additional to this date have failed. So we must understand the importance of us performing in this particular area because it's the only livelihood that we have.

I have to ask the engineers and those who have inventiveness to simplify the product and make it more reliable with – on the other hand, simplification means a reduction of work and lay-offs unless you get work. So I have a controversial problem. I ask the people to become efficient, to work harder, which means then it will take perhaps less

people to do the same job. So I have to come out and I cannot say bluntly, I'm trying to ask people to eliminate jobs of others. That's a difficult subject to convey across. But that is about the only thing I can do. That's the only way I can deliver a lower-priced product. And a more reliable product. And a more reliable product may mean less units required.

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Page 1860, line 20 to Page 1860, line 25

Q. (By Mr. Lyons) Mr. Papadakos, I believe I asked you so I will make the question very short – did you ever answer any of the leaflets and pamphlets that were distributed outside of your company gates from January 1963 to June 30, 1964? A. No.

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Page 1884, line 11 to Page 1884, line 25

Q. (By Mr. Lyons) And do you remember that some time there was a conversation with him in which your daughter was present?

A. (By Peter Papadakos) In which –

Q. I mean your wife was present? A. If I recall a conversation?

Q. Concerning testimony that was given here yesterday relative to 30 people who were terminated from Gyrodyne. A. The only statement that I have made either to my father-in-law or to my wife together or non-together, is that there is a case pending where a – despite a substantial number of people have been laid off, the government claims that I had prejudice against 30. I only explained what the case was about. I made the remark that it was a totally unjustified case because I was accused of being prejudiced on a portion of the people that they

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Page 1977, line 11

CROSS EXAMINATION

Q. (By Mr. Leiner) All right, Mr. Papadakos.

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Page 1977, line 13 to Page 1979, line 1

Q. Did Mr. Ackles give you for your observation union handouts and literature in the period January 1964 through June 1964? A. I would say he has given a few.

Q. Did Mr. Manico give you any of these union handouts? A. No to the best of my recollection.

Q. Do you remember – A. No, sir.

Q. Do you remember what any of these handouts were, what they said? A. Well, most of them at the beginning –

Q. During the period January '64 through June '64. A. I cannot answer during that period because this campaign is supposed to have been going on much earlier than that.

Q. I agree with you, but I am just restricting myself to that period. A. I cannot tell you for that period because to me most of the stuff are stereotyped and which one I saw, the original approach or when I saw approach, I cannot tell you.

Q. Did you ask Mr. Ackles for the literature or did he voluntarily just show them to you? A. I would say voluntarily. I mean, keeping informed. They will deliver it to my secretary, and sometimes I will make a motion drop it in the bucket, and sometimes if I have time to read it, I will read it. I have lots of material to read and it depends if the day is not too pressed and you want some refreshing literature, you read that stuff. If the day is pressing, you just have to put that stuff in the waste-basket.

Q. You didn't take the substance of what was on the papers very seriously? A. No. I have seen that quite a bit.

Q. As a matter of fact, you weren't concerned, were you, that the union was attempting to organize you employees? A. No. that's something I have to live – I have been living with it ten years and I will live with it I don't know how long more.

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Page 1989, line 9 to Page 1989, line 18

Q. (By Mr. Leiner) Mr. Papadakos, would you tell me the date of the last company-wide speech that you made to all your employees prior to June 11th, 1964? A. Prior to June 11th?

Q. Prior to June 11th. A. The date prior to June 11th?

Q. Yes. A. I cannot give you the date except to tell you that was sometime in the early part of 1963. I do try to make one every year.

* * * * *

Page 1989, line 24

A. It is an annual event.

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Page 2000, line 6 to Page 2000, line 8

Q. I believe you testified, Mr. Papadakos that you used the word "wall" in your second speech, is that correct? A. Yes, sir. That's what I understand.

* * * * *

Page 2000, line 15 to Page 200, line 25

Now, you testified, I believe, that you didn't mean to use the word "wall," isn't that true? A. I said I used a word "wall" –

Q. Just answer my question. A. Now listen, you are not pinning me down on technicalities when I said at the outset yesterday, I am expressing spirit, a thought and let us stay in the spirit and the thought and not a play of words and I explained that I meant in an expanding company, there are no obstacles or walls. I was trying to explain to people how you progress, what is happening.

* * * * *

Page 2001, line 10 to Page 2002, line 7

Q. Mr. Papadakos, would you tell the Trial Examiner to the best of your recollection, what you said with regard to "wall" in the second speech? A. Yes, sir. I said, sir, in the industry the people feel the only reason they don't get promoted because there is somebody ahead of them and if he dies, he has a chance or something happened or he quits. And that's considered an obstacle, you know.

Well, when you get to the top, for somebody to get to be president, well, I have to be out. I have to die or resign or something.

As you get down to the lower levels, in order to become a foreman, it doesn't mean a foreman has to die off, move or leave or something. It is the expansion of the business that creates positions of that type. And I said that, therefore, there are no obstacles for a man to get ahead if a company is expanding, is getting bigger. We have to promote people and people getting up.

On the other hand, if a company is shrinking, it loses business and getting smaller and smaller, top people drop down and they create real obstacles for the others to move.

That's what I tried to convey.

* * * * *

Page 2218, line 1 to Page 2218, line 8

CROSS EXAMINATION

Q. (By Mr. Leiner) I ask you now about how many of those employees were production and maintenance employees? A. (Anthony Caliendo) I couldn't give you the exact number.

Q. The best you can. A. I would say there was approximately 275.

Q. So that in April, 1964, there were about 275 production and maintenance employees? A. Yes, sir.

* * * * *

SUPPLEMENTAL DECISION

On March 12, 1968, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which it adopted the findings, conclusions, and recommendations of Trial Examiner Arthur E. Reyman as contained in his Trial Examiner's Decision of January 21, 1966. The Board therein accepted the Trial Examiner's credibility resolutions, found that certain individuals with knowledge of employee union activity were not supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended, and concluded that Respondent had not engaged in conduct in violation of Section 8(a)(1) and (3) of the Act as alleged. Subsequently, the Charging Party filed with the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Board's Order dismissing the complaint.

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[1] 170 NLRB No. 25.

Thereafter, on November 5, 1969, the Court handed down its opinion[2] in which it stated that certain of Respondent's records, subpoenaed by the General Counsel but not produced by Respondent, appear clearly relevant to the issues in the case. The Court noted that while the Trial Examiner had originally stated that he would draw adverse inferences from Respondent's failure to produce, he later stated that "I make nothing of the fact that the Company refused to respond to the subpoena." The Court was of the opinion that if adverse inferences from Respondent's failure to produce were not to be drawn, the failure to draw such adverse inferences should be explained. Accordingly, the Court remanded this case to the Board to either (1) explain the failure to draw the requested inferences, (2) draw the inferences and explai the consequences, or (3) require production of the records.

On February 2, 1970, the Board issued a Notice to Show Cause why it should not draw an adverse inference from the Respondent's failure to produce the subpoenaed records and, if it should draw such adverse infernece, why it should not reverse its original decision dismissing the complaint. Thereafter, the General Counsel, the Respondent, and the Carging Party filed memoranda in response to the Notice to Show Cause, and the Charging Party filed a brief in reply to the Respondent's response.

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2 419 F.2d 686.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board, having reexamined the Decision and Order, the Court's Decision, as well as the entire record including the parties' responses to the Notice to Show Cause, adheres to its original Decision and Order herein. In doing so, we conclude that under the circumstances noted hereafter it was unnecessary to draw adverse inferences and that the failure to draw the requested inferences was not prejudicial.

We agree with the Court that the subpoenaed material appears clearly relevant. Usually, the failure to produce such material gives rise to an inference that it would be unfavorable or adverse to the party failing to produce it, and also has persuasive value in discounting the credibility of the party failing to produce. However, the failure to produce is a fact to be considered in view of all of the circumstances of the case. Had Respondent's oral testimony been unreliable or untrustworthy, the subpoenaed materials would have assumed more importance.[3]

The issue of the subpoenaed materials was, to say the least, vigorously litigated. When the issue of the relevant subpoenaed records first arose, the General Counsel questioned the Respondent's Assistant Personnel Manager in general terms about their existence and whereabouts. The record reveals that some of the subpoenaed records were available and in the hearing room. After the Trial Examiner suggested that the General

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[3] *Mid States Sportswear, Inc.*, 168 NLRB No. 74; *Crow Gravel Co.*, 168 NLRB No. 141.

Counsel call for the production of the records, if relevant, the matter was temporarily dropped. Later, both the General Counsel and the Trial Examiner asked Respondent's witness to produce the payroll record for the "blade department" pursuant to item 1 of the subpoena. However, item 1 of the subpoena does not mention the "blade department," but merely requests payroll and personnel records for 75 listed employees and supervisors. When the Respondent's attorney attempted to call this discrepancy to the attention of the trial Examiner,[4] the Trial Examiner noted that production of the records had been refused, that he would draw his own inferences therefrom. Later, when the Charging Party called for the personnel records of a specific individual, Respondent produced the file, stated that it would not allow a "free-for-all inspection" by the opposition, but allowed the Trial Examiner to inspect it. After examining the file, the Trial Examiner stated that he thought "that the anticipation of finding things in here which you hope to find is unwarranted . . ." The Trial Examiner suggested that the Charging Party and General Counsel question from summary blue card form in the personnel files of each discriminatee, stating that he was reluctant to "just turn the file over for a general fishing expedition for whatever may appear in here," and further advising that the proper forum for enforcement of the subpoena was in the District Court. Thereafter, the Charging Party asked for the personnel folder of each alleged discriminatee, and the Respondent offered the "blue card" but refused to furnish any other portions of the personnel records. Both the General Counsel and the Charging Party rejected the offer of the blue cards.

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[4] During the time the Trial Examiner was calling for production of the records, he changed the request to include all the material subpoenaed in item 1, but the Respondent's attorney still believed that the request was only for the "blade department."

As the Court noted, payroll and personnel records were relevant in seeking to show reasons for the discharges. However, the General Counsel's exhibit number 11 compiled from the records of the Respondent, substantially complied with the General Counsel's request for the Company's reasons for discharge. That exhibit on its face showed termination and reasons therefor for all terminations taking place between January 1, 1964 through October 31, 1964. Moreover, it is clear from credited testimony that the reasons for terminations, as stated on that exhibit, were compiled from company and personnel records. In addition, Respondent offered to supply the summary blue card form from all personnel records from which the General Counsel or the Charging Party could have begun interrogation of Respondent's witnesses had they desired to take advantage of the offer. In this regard, the blue card summary for each employee could have been compared as to job description, rates of pay, supervisory authority, and other matters, and responsibility for failure to do so cannot now be attributed to Respondent. Finally, no one has suggested exactly what inference can be reasonably drawn from Respondent's failure to supply the complete personnel folder, particularly in view of the fact that the Employer's reasons for discharge are stated on the General Counsel's exhibit number 11. Nor have the General Counsel or Charging Party indicated what material would be relevant within those files. Consequently, we are unable to infer that the personnel files will establish that the discharges were because of union activity, the inference apparently implied by the Union.

At one point in the hearing, the General Counsel asked Respondent's Assistant Personnel Manager if the Company maintained manuals and

charts with regards to lines of authority, but withdrew the question before it was answered. When asked by the Charging Party, the Respondent produced an organizational chart, which was identified as an exhibit of the Charging Party. The exhibit was further identified as a current chart covering the structure of the "fabrication" department, which apparently included many of the departments in which the alleged discriminatees involved herein worked. It was explained that the chart was current and that only a current chart was maintained. The Charging Party did not introduce the chart in evidence nor elicit any meaningful testimony regarding supervisory status from it. Rather, after having an opportunity to examine the chart, the Charging Party refrained from questioning about the chart. Still, the Charging Party requests us to infer that the Company's leadmen were supervisors or agents of the Company within the meaning of the Act, because the Company refused to furnish requested documents. From the record, and under the circumstances, we believe the Company substantially complied with the Charging Party's request to this aspect of the General Counsel's subpoena. There was no refusal to furnish the chart the Charging Party identified as an exhibit, but failed to offer.

Regarding a list of employees rehired, the record shows and the testimony was credited, that none of the laid off or discharged employees were subsequently rehired. There was also credited testimony that further terminations had taken place subsequent to the alleged discriminatory discharges which were not even alleged as discriminatory. And the record discloses that the total number of employees dropped substantially from the time of the alleged discriminatory layoffs until the time of the hearing.

Although it is true that the Board generally views suspiciously a failure to produce relevant documents and material witnesses, and will draw adverse inferences from such failure in appropriate circumstances, we deem it unwarranted to draw those inferences here where the Employer's witnesses are credited, where the General Counsel and the Charging Party refused some documents produced, and where the Employer did produce many of the documents requested. Indeed, at one point, the General Counsel asked if the Respondent had a list of employees transferred, and on obtaining an affirmative response, the matter was dropped.

Even assuming, *arguendo,* adverse inferences were to be drawn from the Respondent's failure to produce, we nevertheless do not believe that such inferences as could be drawn would produce a sufficient evidentiary base for reversing our Decision herein, particularly in view of the Trial Examiner's credibility findings which were based on evidence subsequently adduced by the Employer.

Moreover, the General Counsel had adequate opportunity to seek enforcement of his subpoena in Court. He did not do so, but proceeded with the presentation of his case, often through secondary evidence even after being advised on numerous occasions that the forum for enforcement was with the Courts. Our determination here does not mean that we condone all the actions of the Respondent or that we will not in other circumstances draw adverse inferences from failure to produce relevant materials subject to a lawful subpoena. We do conclude that under the circumstances of this case, there was no failure to draw adverse inferences which was prejudicial to any party. We adhere to our original Decision and Order.

Dated, Washington, D. C.

EDWARD B. MILLER, Chairman

JOHN H. FANNING, Member

GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

REPLY BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,785

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition To Review an Order of the National Labor Relations Board

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INDEX

TABLE OF CASES

AUTHORITIES

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REPLY BRIEF FOR PETITIONER

As our main brief demonstrated, the Labor Board's Supplemental Decision offers diverse and ineffective rationalizations that fail to explain the Board's refusal to draw adverse inferences against Gyrodyne arising from its suppression of critical subpoenaed documents. The brief now filed by the Board's attorneys similarly proffers differing

and entirely inadequate reasons for the Board's refusal to honor the prior remand from this Court. This reply seeks to dispel the attempted obfuscation of the central issue before this Court: whether the Labor Board is required to infer from Gyrodyne's suppression of the subpoenaed hiring records that the 30 terminated UAW employees were replaced by non-union hires.

In a complete departure from the stated predicates of the Board's Supplemental Decision, the Board's attorneys now seek to justify the Board's conclusion by asserting (Br. pp. 13, 19, 21) that the General Counsel failed to prove Company knowledge of the Union activities of the terminated UAW members and that he therefore failed to prove a prima facie case of discriminatory motivation for their separations. To the contrary, we would contend that the extraordinarily high proportion of UAW adherents (30 of 36 regular production and maintenance employees) terminated at the height of the Union's organizing campaign, and only just after Gyrodyne's public pronouncements of glowing prospects and job security for these production and maintenance employees, does constitute a prima facie case. As we demonstrated in our main brief in No. 22,186 (at pp. 8, 33-34) the statistical probability that 30 of 36 separated regular employees would be unionists is about 1 in 100,000. At the very least the General Counsel thus surely made out a prima facie case requiring the Company to come forward and explain how it happened to select so many UAW members for termination. Cf. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967). However, for the reasons stated hereafter, including the fact that the Board itself has found that a prima facie case *was* made out, this Court need not resolve the "prima facie" issue on its merits.

1. *Chenery Precludes the "Prima Facie Case" Contention.* The Board's Supplemental Decision—which offers a variety of inadequate reasons for failure to draw the in-

ference against Gyrodyne—nowhere found that the General Counsel failed to make out a prima facie case. The Board's lawyers are thus attempting to offer a rationalization for the Board's conclusion which the Board itself wholly failed to mention in its recitation of supposed justifications for its refusal to draw the adverse inferences. It is settled law that the Board's lawyers cannot so do. An agency cannot urge "considerations . . . in support of the . . . order [which] were not those upon which its action was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 92(1943); accord: *NLRB* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 443-44 (1965); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *Thompson* v. *Clifford*, 132 U.S. App. D.C. 351, 356 n. 24; 408 F.2d 154, 159 n. 24 (1968); *NLRB* v. *Southbridge Sheet Metal Workers, Inc.*, 380 F.2d 851, 856 (C.A. 1, 1967). *Chenery* thus bars the "no prima facie case" rationalization for the Board's Supplemental Decision. Indeed, as we now show, the present facts are even stronger than those which normally invoke *Chenery*.

2. *The Board Itself Found a Prima Facie Case Established.* Here the rationale offered by the Board's lawyers (that the General Counsel failed to make out a prima facie case) would not only be an embellishment on the Board's Supplemental Decision, it would also *contradict the original 1968 Decision and Order by the Board.* There the Board adopted *in toto* the rulings, findings and conclusions of the Trial Examiner (see Vol. IV, pp. 74-75 of Appendix in No. 22,186). Before the Trial Examiner the Company had moved to dismiss following the presentation of the General Counsel's case, on the grounds, *inter alia,* that "[w]e have complete failure of any proof showing *knowledge of union activities* by executives or responsible parties in connection with discharges or layoffs of these 30 [dis]chargees." (Tr. p. 1780, emphasis supplied). The Trial Examiner responded: "I do

believe . . . that there is enough in the record so far uncontroverted *which makes out a prima facie case* and I would deny your motion to dismiss the complaint at this time." (*Id.*, emphasis supplied). This ruling of the Trial Examiner, which was adopted by the Board, utterly contradicts the present assertion of its attorneys that the General Counsel failed to prove knowledge and therefore failed to make out a prima facie case. Surely if "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained" (*Chenery*, 318 U.S. at 95), it is even clearer that it cannot be upheld on a ground which the agency's decision has actually rejected!

3. *The Suppressed Subpoenaed Documents Themselves Established a Prima Facie Case.* Even if consistent with *Chenery* and the Board's finding, the "prima facie case" argument were somehow deemed available here to the Board, it would be no answer to the present issue over the Board's procedural default. For here the General Counsel initially subpoenaed the rehiring documents, in part *for the very purpose of establishing his prima facie case.*[1] The fact which he hoped thereby to show—that the 30 separated unionists were replaced by newly-hired or rehired employees—surely would suffice to establish an overwhelming prima facie case of discrimination. But under the "no prima facie case" rationale the Company could escape the consequences of its suppression of documents relevant to the General Counsel's affirmative case and then make the very defect in proof thus occasioned the basis for refusal to draw the evidentiary inference! The Board's circular reasoning makes a mockery of the adverse inference rule, encouraging and rewarding a party such as

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[1] Contrary to the Board's asertion (br. p. 18), the General Counsel did specifically call for production of the subpoenaed documents (See Vol. I, p. 18 of Appendix in No. 22,186).

Gyrodyne which has suppressed subpoenaed evidence demonstrating its discriminatory conduct.[2]

* * * *

Nothing in the Board's brief can obscure the compelling inference which arises from Gyrodyne's refusal to produce the rehiring evidence. As this Court asserted in this case, "the list of persons hired or rehired could have shown whether employees that Gyrodyne claimed had not been replaced had been replaced." (136 U.S. App. D.C. at 105 n. 1, 419 F.2d at 687, n. 1). That the suppressed list of persons hired or rehired *would indeed* have shown that the 30 unionists were replaced is underlined by Gyrodyne's continuing failure even following this Court's remand to produce these documents at the risk of the drawing of the adverse inference against it.

The inference which compellingly arises from the Company's conduct not only strengthens the proof of violation but makes a shambles of its "cost reduction" justification for separating so many Unionists at the height of the Union's campaign. In its brief the Board itself recognizes the vital importance of whether these employees were replaced, repeatedly relying on oral testimony by management witnesses that the employees were not replaced and that additional employees were separated in the months following the terminations. (Bd. Br. pp. 5, 13-14, 18). Contrary to the Board's assertion, the Company's oral testimony on this point does not render "less significant the documen-

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[2] In a diversionary tactic, the Board erroneously asserts that the Union would invoke the best evidence rule to preclude the Board's reliance on the oral testimony of management officials on the rehiring issue (Bd. Br. pp. 15-17); having raised this straw man, the Board proceeds to strike it down with the assertion that the General Counsel failed to oppose the Company's introduction of secondary evidence. But the adverse inference principle upon which we rely is entirely separate from the best evidence rule (compare II Wigmore on Evidence §§ 285-91 with IV Wigmore §§ 1174 *et seq.* (3rd ed. 1940)). Since the best evidence rule is not at all applicable to the instant case, we did not rely upon it. For the same reason, the Board's reliance on the General Counsel's lack of objection to the Company's secondary evidence is equally irrelevant to the pending issue.

tary evidence the Company failed to produce" (Bd. Br. p. 14), but rather gives additional compelling grounds for disclosure. After Gyrodyne's President Papadakos testified that the employees were not replaced (see Bd. Br. pp. 13-14, SA-24, SA-27), the evidence suppressed by Gyrodyne became critical also for impeachment of the Company's principal witness and thus doubly relevant.

When Papadakos' credibility is thus impeached by the inference from nondisclosure, a remedial order is surely required. For if Papadakos lied with respect to the important question of replacement of the terminated UAW supporters, his repeated denials of any discriminatory motivation in their termination plainly may no longer be credited. With the dissipation of the Company's "cost reduction" defense and the discrediting of its principal witness, the record simply requires a finding that the Act was violated by termination of the Unionists at the height of the Union's campaign.

Respectfully submitted,

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